No. 83 (The Arbitration Case)

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Supreme Court of the United States

October Term, 1930. No. 83.

PARAMOUNT FAMOUS LASKY CORPORATION, *et al.*,
Appellants,
against
UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANTS' BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1930.

PARAMOUNT FAMOUS LASKY CORPORATION, *et al.*, *Appellants*, *against* UNITED STATES OF AMERICA, *Appellee.*	No. 83

APPELLANTS' BRIEF.

Preliminary Statement.

This is an appeal from a final decree in equity of the United States District Court for the Southern District of New York (THACHER, D. J.) enjoining the Appellants (defendants below) from doing certain acts and persevering in certain practices which the Petition alleged, and the Court held, constituted a violation of the Sherman Act. For the Opinion, see 34 F. (2d) 984, R., p. 158. On June 2, 1930, this Court found that probable jurisdiction had been shown.

The Appellants include ten of the largest distributors of motion pictures in the United States and the principal agencies through which motion pictures are licensed and distributed to the exhibitors throughout the country.

The substance of the Petition is that the Appellants agreed upon a uniform contract, and agreed among them-

selves to tender no other contract to exhibitors who sought to obtain pictures from them or through the distributing agencies. Restraint is claimed to lie in the exclusion from the trade of exhibitors to whom the uniform contract is not acceptable; and the feature of the contract especially stigmatized both in the Petition and in the Opinion is the Arbitration Clause, which is rendered effective through the alleged agreement among the Appellants not to perform, until security is deposited, existing contracts with any exhibitor who has refused to arbitrate a dispute or has failed to comply with an arbitration award entered against him.*

Certain "supplemental agreements" are set forth in the Petition (part IX, 6, R., p. 33). They chiefly concern a practice on the part of certain of the Appellants' agents—a practice abandoned (*infra*, p. 82) before the entry of the Decree appealed from—of refusing to enter into *new* contracts with exhibitors who have not complied with awards, unless and until such exhibitors furnish security.

It is the contention of Appellants that the Decree was erroneous and contrary to law in all respects, except as to the so-called "supplemental agreements" described in Point V, *infra*.

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*Under the rules, the exhibitor has seven days in which to comply with an award, and upon non-compliance, seven additional days are given him in which to deposit security. A notice of suspension may then be sent out, but as a practical matter, as we shall hereinafter show (*infra*, p. 69), a further delay of from seven to ten days is frequently allowed to intervene before suspension occurs.

Peculiar features of the Motion Picture Industry which bear upon the reasonableness of the Standard Exhibition Contract and Rules of Arbitration of 1928 assailed by the Government.

Material to the questions presented, within Rule 27, 2, (d) of the Rules of this Court, are certain facts concerning the general working of the Motion Picture Industry; for there are a number of peculiar features of the industry which have a direct bearing on the fundamental question before the Court, to-wit, whether the Standard Exhibition Contract and Rules of Arbitration of 1928, which were assailed by the Government, fall within the category of normal and reasonable trade regulations as defined by previous decisions of this Court.

From the beginning of the motion picture industry the agreement between the distributor and exhibitor has been in the form of a written contract (R., p. 198). In this respect the motion picture industry probably differs from most other industries.

In respect to each picture, the exhibitor (the owner or operator of a theatre), acquires a license under copyright to exhibit the picture at a specified theatre for a limited number of days stated in the contract (Pet., R., p. 61). He acquires nothing more than the right to use for a limited time the property of the distributor which must be promptly forwarded to the next exhibitor or returned to the distributor at the conclusion of its use, to allow a like use to be made of it by other exhibitors who have acquired a similar right in the same picture, for exercise at a different time.

As a rule, the exhibitor contracts, in the spring of the year, with a distributor for a group of pictures, varying in number from 20 to 60 (Pet., Part V, 5, R., p. 19), to

be produced and released or made available for exhibition at regular intervals over the period of one year, commencing in the following autumn. The contract is negotiated and concluded prior to the production of most of the pictures and before their release date, except in case of spot bookings (R., pp. 194-195, 381) of single pictures. Therefore, it is provided in the contract for the selection or designation of playdates as the pictures become available for exhibition. This arrangement requires a clearly drawn provision and cannot be trusted to verbal agreement. Other subjects on which complete agreement between the parties is made are matters relating to the time and place of exhibition, "protection" and "run," delivery and return of prints, loss and damage to prints, description and titles of photoplays, exhibition and advertising, warranty as to advertising, delay in or prevention of performance, taxes, minimum admission charge, racial or religious matter, arbitration and effect of waivers of defaults (Pet., R., pp. 61-71).

For these reasons it has always been the accepted practice in the industry to put all exhibition agreements in the form of written contracts, all persons interested, exhibitors and distributors, recognizing from the beginning of the industry that otherwise there would be continual misunderstanding in the dealings between the exhibitor and the distributor.

An exhibitor uses feature pictures, short subjects, comedies and news reels. It is and has been the custom for many years to contract separately for each of these classes of pictures.

No single distributor in the course of a year distributes sufficient feature pictures to supply the average exhibitor's complete program (R., p. 196).

Between 500,000 and 750,000 contracts for the exhibition of pictures are entered into annually by the distributors with the owners and operators of the 25,000 theatres in the United States (R., p. 298). Under these contracts there are more than 11,000,000 deliveries of pictures each year from distributor to exhibitor. In respect of each picture it is also necessary for the distributor and the exhibitor to come to an agreement on the playdate subsequent to the execution of the contract, excepting in comparatively few instances where playdates are specified in the contract.

As each contract usually licenses the exhibition of a group of pictures (Pet., Part V, 4, R., p. 19), each contract after execution involves from 20 to 60 subsequent agreements relating to playdates each of which playdates is arranged in the manner provided for in the contract.

Prior to 1923 the contracts of the various distributors differed from each other in many particulars.

The Appellants put in evidence 17 contracts used by 10 different companies (Exhibits "A" to "Q," R., pp. 484-523) in 1921 and 1922 before the adoption, under circumstances hereinafter described, of the Uniform Contract. An exhibitor was likely to do business with all or a great number of these distributors in the course of a year (R., p. 202). No two of these contracts were alike. Much confusion resulted. For instance, before the Uniform Contract of 1923, the machinery for the designation of playdates was totally different in the contracts of the different distributors (R., p. 253). This made it very difficult for the exhibitor. If he had contracts with five distributors he was required to learn and follow the provisions of each contract on this complicated matter and there was no assurance that he could arrange his bookings in accordance with his needs and desires. It took

many months to work out the elaborate system for the fixing of playdates set out in the Standard Contract of 1926 (R., p. 295).

In this vast industry countless disputes occur in the course of each year in the performance of these 11,000,000 deliveries. This factor, coupled with the circumstance that exhibitors contract for a right to the possession and use of films *seriatim,* has rendered it essential that controversies with one exhibitor be settled, wherever possible, before the time when the next exhibitor's right to actual possession begins.

Promptness of decision is thus almost as important as fairness of decision. This fact is recognized throughout the industry. Furthermore, the rental value of a motion picture film is greatest when it is new, *i. e.*, immediately after the date of its release or availability for exhibition; as the release date becomes ancient, the rental and exhibition value of the picture rapidly diminish (Answer, par. XII, R., p. 132). Therefore, if the exhibition is prevented by long drawn out litigation, both the rental value of the picture and its drawing power will disappear before the litigation is terminated. Obviously, an unsettled controversy relating to the delivery of one picture upsets the application of the contract to the other pictures specified in the contract. The mutual obligations of the parties in respect of the other pictures are usually dependent upon the decision of the controversy. What those obligations are cannot be determined until the liability in respect of the matter in controversy is fixed (R., pp. 312-314).

A breach by either the distributor or the exhibitor of the contract between them often affects another exhibitor. Tardiness or negligence in specifying a playdate may

delay the subsequent runs of the picture at other theatres and thus lead to controversies between the distributor and the exhibitors operating such other theatres. Prompt determination of this particular kind of controversy is of the utmost importance.

The conditions in the industry prior to 1923, the confusion arising from the use of numerous forms of contracts, the custom of demanding advance deposits of exhibitors, the bad feeling between distributors and exhibitors growing out of the arbitrary clauses contained in the contracts authorizing distributors to forfeit advance deposits, terminate contracts and demand additional payments, and the numerous breaches of contract by exhibitors and consequent losses to distributors, have been described at length in the evidence.

Prior to 1923 many hundreds of law suits throughout the United States were commenced each year by distributors and exhibitors, all arising out of controversies relating to the performance or non-performance of contracts for the leasing and exhibition of motion picture films. A great number of such law suits were pending in 1922 (R., pp. 297-299). This litigation greatly increased the cost of distribution and exhibition of pictures and tended to create much bad feeling in the industry.

The Exhibitors, who took the initiative in the movement for uniformity, began their agitation in 1921, their two chief objects being (1) uniformity in the exhibition contracts, and (2) the abolition of the practice of calling for advance deposits (R., pp. 200, 205, 311). By 1923 the first uniform contract, containing an arbitration clause, had been evolved by a committee of distributors and exhibitors. Complaints from the Exhibitors that

true uniformity had not been attained because special clauses were always being added, led to further conferences and committee meetings in 1926, and ultimately to the first Standard Exhibition Contract of that year. Grounds of dissatisfaction with this contract were eliminated two years later by the second Standard Exhibition Contract, adopted May 1, 1928, the Committee which heard the complaints about the old contract and which evolved the new being appointed at a Trade Practice Conference held under the auspices of the Federal Trade Commission. We discuss the evolution of the various contracts in Point I, sub-points 2, 4 and 5, *infra.*

This industry has been operating nearly six years under the Arbitration Plan, but the Government has brought forward not only *no evidence of any injury to anyone, but also no complaint by anyone.* From such a hiatus in the Government's proofs the Appellants are entitled to draw inferences favorable to themselves, as this Court expressly declared in *United States* v. *United States Steel Corporation,* 251 U. S. 417, 448 (1920). On the other hand, the Appellants' evidence shows that thousands of exhibitors are supporting the Plan.

About 75,000 claims, involving $18,241,353, have been disposed of under the Arbitration Plan. The evidence is all to the effect that there has been a vast improvement in the industry since 1923. There is no dispute about this, and the Court so found (R., p. 168). The Arbitration Plan, the practical working of which we shall discuss in Point III, *infra,* provides for the appointment of three arbitrators by the distributors, and three by the unaffiliated exhibitors.* Provision is made in case of tie

* An unaffiliated exhibitor is one whose theatre is not owned or controlled by producers or distributors. R., p. 104.

for the appointment of a seventh arbitrator by the President of the local Chamber of Commerce or by the Mayor of the community. Yet in 1928, only 28 cases required the services of a seventh arbitrator, although in that year 7,304 awards were made and 23,869 claims were disposed of under the Arbitration Plan (R., pp. 644-645).

Perhaps the strongest proof of the fairness of the Plan lies in the absence of suits to modify or set aside the awards. (See Point III, sub-points 2 and 3, *infra*). Witness after witness testified that there had been no suits of this character in the territory of their Film Boards of Trade. Litigation has in fact ceased. In 1928 not a single claim was litigated before submission to the Board of Arbitration, and practically all the litigation after submission to the Board involved proceedings to confirm awards as judgments. (See Appellants' Exhibit I-1, R., p. 644).

The Government admitted of record by stipulation (R., p. 16) that competition among distributors had not been reduced by the plan; and it was shown by the testimony that the number of theatres had increased between 1923, the date of the first uniform contract, and 1929, the date of the trial (R., p. 298).

Analysis of the Pleadings.

A. *The Petition.*

The Petition names as defendants ten distributors of motion picture films, an association of distributors known as Motion Picture Producers and Distributors of America, Inc., and thirty-two Film Boards of Trade (and the officers and members thereof).

The Film Boards of Trade are located in thirty-two of the larger cities in the United States which are centers for the distribution of films, and their personnel is made up of the Exchange Branch Managers of various distributors operating in the territory covered by the particular Film Board of Trade. The functions of the Exchange Managers are, according to the Petition (part IV, R., p. 14), to negotiate with Exhibitors for the leasing and exhibition of motion picture films; to select exhibitors with whom to do business; to receive applications for films upon standard forms; to forward applications to the principal offices of the various distributors; to report to exhibitors which applications have been accepted and which rejected; to arrange play dates and notify exhibitors of the dates arranged; to arrange deliveries of films. The Exchange Managers collectively are charged with the duty of acting as part of the personnel of a Board of Arbitration, and, as individuals, with the duty of prosecuting before the Board of Arbitration claims on behalf of the particular Distributor whom they represent, of defending before the Board of Arbitration claims filed against their Distributor by Exhibitors, and of enforcing awards when made, all in accordance with certain Rules of Arbitration (Exhibit "G" annexed to Petition, R., p. 104).

The Petition describes the mode of producing films and the agencies employed in their distribution; it shows (parts VI and VII, R., pp. 24-25) that interstate commerce is involved.

The alleged conspiracy is described in Part VIII (R., p. 25) and appears to be based upon the combination of the defendants to coerce exhibitors into submitting disputes to arbitration, into waiving their rights

to resort to courts, and into complying with awards of the Board of Arbitration, the last object being accomplished by an alleged collective refusal, until security is furnished, * to supply films to exhibitors who have either refused to submit disputes to arbitration or failed to comply with awards which may have been entered against them.

The means by which the alleged conspiracy is carried into effect are (Pet., part IX, R., p. 27) the preparation and adoption by the distributors of a uniform contract which they agree to employ to the exclusion of all other forms, it being an integral part of the Contract that disputes shall be submitted to arbitration, and awards enforced by the means already referred to. The Petition describes the successive phases of the uniform contract: first there was a "Uniform Exhibition Contract" adopted in 1923, then a "Standard Exhibition Contract" of March 1, 1926, and then a "Standard Exhibition Contract" of May 1, 1928. The last two Contracts mentioned provided for the adoption and application of certain Rules of Arbitration. The various Contracts and the Rules of Arbitration are annexed to the Petition as Exhibits. (1923 Contract, R., p. 36; 1926 Contract, R., p. 46; 1928 Contract, R., p. 61; 1928 Rules of Arbitration, R., p. 104). The Petition then describes the organization of the various Film Boards of Trade and the manner in which the Boards of Arbitration function.

The Petition (part IX, 6, R., p. 33) also describes certain "supplemental agreements", but admits that they were adopted "without the knowledge and against the general instructions of the defendant distributors and of the defendant Association."

* See footnote, p. 2, *supra*.

B. *The Answer.*

The Answer denies the existence of any unlawful conspiracy, but admits, with occasional qualifications, the general description of the motion picture industry set forth in the Petition. It admits that interstate commerce is involved. The Answer denies that exhibitors were at any time coerced. Authority on the part of the Film Boards of Trade or their members to make the "supplemental agreements" is denied (R., pp. 117-119).

Following a mode of pleading sanctioned by this Court in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238 (1918), and by way of affirmative defenses taking the form of explanation and justification, the Answer (R., p. 120) sets forth in great detail the facts peculiar to the motion picture industry, the manner in which the Standard Exhibition Contracts and Arbitration Plan came into being, the need in the industry for a plan of arbitration (R., p. 131), the reason for adopting the rules relating to the enforcement of the decisions of the Boards of Arbitration, the purpose, nature and effect of such rules, the intent of defendants and the end sought to be accomplished by them and the beneficial results brought about by several years' use of the Arbitration Plan (R., p. 137).

The truth of a number of allegations in the Answer was admitted by the Government in a stipulation read into the Record at pages 192-198.

The Trial.

At the trial the Government called only six witnesses, viz., four exhibitors, Messrs. Steffes, Yamins, Cole and Seider, Mr. Abram F. Myers, formerly member of the

Federal Trade Commission, who gave some testimony about the Federal Trade Practice Conference, and Mr. C. C. Pettijohn, General Counsel of the Film Boards of Trade, the latter solely for the purpose of identifying a copy of a speech made by him to a national convention of exhibitors. The Government put in evidence many papers taken by it from the files of defendants. It rested its case on the testimony of these six witnesses, the pleadings and papers taken from defendants (R., p. 191).

The Opinion Below.

The opinion (R., p. 158), after references to the general description of the industry (to which the Court gave somewhat greater space in the opinion in the companion case, *United States* v. *First National Pictures, Inc., et al.*, 34 F. (2d) 815, 816, the appeal taken therein by the Government being No. 95 on the Docket of this Court for the current Term), and after a description of the parties defendant, takes up step by step the different phases of the movement for a uniform or standard contract. In the summer of 1922, the defendant distributors and the defendant Motion Picture Producers and Distributors of America, Inc., and committees of representatives appointed by various exhibitors associations,

> "appreciating the loss of time and money to the entire industry and the hardships of exhibitors resulting from the many dissimilarities in non-competitive matters existing in the long and complicated contracts of the different distributors in the United States, and desirous of saving such loss of time and money in order to reduce the cost of distribution and exhibition of pictures in the United States, set about the preparation of a uniform or

> standard form of contract, the adoption of which would not in any manner diminish competition between distributors, but which would help to eliminate some of the confusion in the industry arising out of these dissimilarities in matters of detail in intricate contracts" (Opinion, R., pp. 161-162).

The "Uniform Contract" printed as Exhibit "A" annexed to the Petition (R., p. 36) resulted from the 1922 negotiations. The Court then refers to the further efforts at improvement which resulted in a series of conferences in 1925 and 1926 and the evolution of the first "Standard Exhibition Contract" of March, 1926, Exhibit "B" annexed to the Petition (R., p. 46).

The Court then takes up the trade practice conference of persons in the motion picture industry called by the Federal Trade Commission in 1927. The principle of arbitration was approved; and a contract committee of exhibitors and distributors was appointed to revise and improve the 1926 contract and rules of Arbitration. The Federal Trade Commission approved the work of the conference, including the appointment of the Contract Committee for the purposes named.* "The Standard Exhibition Contract" and "Rules of Arbitration" of May 1, 1928 (respectively Exhibit "C" and "G" annexed to the Petition, R., pp. 61 and 104) were the work of this Committee.

The machinery for carrying out the arbitration provisions of the 1926 and 1928 contracts is described by the Court, and is followed by an analysis of the devices for compelling the submission of disputes to arbitration and for securing compliance with the awards. The most important feature is the provision for the circulation among distributors by the secretaries of the appellants

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* See Exhibit "L-1", R., pp. 537-538. And see the summary of this Exhibit at R., p. 547.

the Film Boards of Trade of confidential lists of exhibitors who have refused to submit to arbitration or who have not complied with awards entered against them, the distributors having the right under Par. 18 of the Standard Exhibition Contract to refuse to perform existing contracts with exhibitors so in default until security (not exceeding $500 under each existing contract) is paid by the exhibitor.* (Non-compliance on a distributor's part gives an exhibitor the right to cancel [R., p. 72], but the Opinion does not refer to this.)

After analyzing the Standard Exhibition Contract and Rules of Arbitration as aforesaid, Judge THACHER makes the following conclusions (R., pp. 168-170):

1. The representation of the exhibitors at the negotiations was not complete.

2. Unlawful restraint results from "an agreement among competitors not to trade except upon terms which they have fixed in advance".

3. The justification of reasonableness fails because of the element present of an "involuntary restraint imposed upon the freedom of outsiders to engage in trade under natural and normal conditions"; the situation is not saved by the fact "that competition between distributors is keen and active, or even that it has been promoted and enhanced by what has been done, if, in fact, it can be seen that the freedom of others to engage in trade, to enter into normal commercial agreements, and to have recourse to the courts for their rights, has been unduly restrained by the coercive and collective action of the defendants."

* See footnote, p. 2, *supra*.

4. The imposition of the agreement upon exhibitors not represented in the antecedent negotiations "regardless of their wishes, by coercive combinations having the power to say 'Take what is offered or get nothing' [is] illegal".

5. "* * * the restraint if not shown to have been voluntary on both sides is oppressive, and therefore undue and unreasonable."

The Decree.

Upon the foregoing Opinion, a final decree (R., p. 170) was entered which adjudged to be an unlawful conspiracy in violation of the Sherman Act the agreement of the Appellants to use exclusively in contracting with motion picture exhibitors the "Standard Exhibition Contract" and "Rules of Arbitration" of May 1, 1928, and "all the activities and agreements of [the Appellants] by means of which they have actively coerced adoption of and compliance with" the aforesaid Contract and Rules. The decree then enjoined the continuance of the conspiracy or any other conspiracy formed for the same purpose and effect. More particularly the decree enjoined the Appellants "from entering into any agreement embodying the provisions of paragraph 'Eighteenth' [the arbitration clause] of said 'Standard Exhibition Contract' dated May 1, 1928, and/or the provisions of said 'Rules of Arbitration' dated May 1, 1928". The decree then went on to enjoin the enforcement against any exhibitor of the arbitration provisions on account of any claim under any existing contract, and to enjoin recourse to the device of demanding the furnishing of security by exhibitors who had refused to comply with the arbitration clause. The Appellants were likewise enjoined from retaining sums pre-

viously received as security by virtue of the provisions above referred to, and were enjoined from suspending performance of contracts (or continuing to refuse to perform, if suspension had already occurred) with exhibitors who had refused to comply with the arbitration provisions. A general clause of the decree (Par. II, 9; R., p. 173) enjoined agreements among the Appellants aimed at prescribing in advance the terms upon which contracts might be made with exhibitors if the purpose of the agreement was to coerce (*a*) submission to arbitration; (*b*) waiver of right to resort to courts; or (*c*) compliance with an award of arbitrators without appeal to courts.

The decree contains the following proviso, which brings out the actual scope of the injunctive features:

> "Nothing contained in this decree shall be construed in derogation of the right of the defendants, or any of them, individually or jointly, to negotiate and to agree with any exhibitors of motion pictures on a standard form of contract to be used in licensing the exhibition of motion pictures or on any standard provision or provisions to be included in such license contracts, including reasonable provisions for the arbitration of disputes arising thereunder, if done voluntarily and without coercion, and if applied only to the parties to the negotiations and agreement" (R., p. 174).

Specification of Errors to be Urged.

The errors assigned are twenty-four in number, and none has been abandoned. For convenience of statement they may be thus divided and grouped (the figures in italics refer to the paragraphs of the assignment [R., pp. 176-182]):

(*a*) It was error to hold that the making of the Standard Contract and Arbitration Rules of 1928 and the

means chosen to bring about their general adoption were unlawful acts either under the Sherman Act or the common law, because

(i) such acts were normal and reasonable regulations of a business (*2, 8, 9, 15, 18, 19*);

(ii) The Standard Contract and Arbitration Rules of 1928 were adopted by a Committee appointed at a Trade Practice Conference held under Federal Trade Commission auspices (*4*);

(iii) the Standard Contracts and Arbitration Rules were adopted pursuant to the demands and upon the insistence of the Exhibitors themselves (*5, 6, 7*).

(*b*) It was error to hold that the defendants had agreed to refuse to make departures from the Standard Contract when requested by an Exhibitor (*3*)*.

(*c*) It was error to refuse to hold that the circumstance (admitted of record by stipulation, R., p. 194) that each contract between distributor and exhibitor was a matter of negotiation and bargaining between the parties negatived unlawful coercion (*23*).

The Appellants, in support of their assignment of errors deny the conspiracy charged, and put forward three affirmative defenses—the normal and reasonable regulatory character of the Standard Contracts and Rules of Arbitration, the trade necessity of uniformity, and the special fitness of the device of Arbitration in view of peculiar factors immanent in the Motion Picture Industry.

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* This point may be disposed of briefly here. The only relevant testimony is at R., p. 461, where one of the Government witnesses said: "Salesmen never offered to contract except on the standard contract." This is, we submit, totally different from testimony that, after communicating their initial offer, they invariably refused to entertain any counter-offers from exhibitors, *i. e.*, requests for departures from standard forms. The finding of the Court (R., p. 170) is therefore unsupported.

POINT I.

The Standard Exhibition Contract and Rules of Arbitration of May 1, 1928, having been evolved after six years of discussion and experimentation, are reasonable and normal regulations for the intelligent conduct of the industry; so that whatever restraint they produce falls short of unlawful coercion.

1. The Decisions.

It would be idle to pretend that the case at bar is governed by apposite authority. This Court has often announced that

> "each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied." *Maple Flooring Assoc.* v. *United States*, 268 U. S. 563, 579 (1925).

All that we can do is to suggest a major premise; and for that purpose the most helpful language is that of Mr. Justice BRANDEIS, speaking for a unanimous Court, in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918). He said:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which

> the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

In *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179 (1911), this Court, explaining its own decision in *Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911), said:

> "It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose."

The same thought found slightly different expression fourteen years later in *Maple Flooring Assoc.* v. *United States, supra*, where the Court said (268 U. S., at p. 583):

> "It was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations, * * *."

And in a pioneer case under the Sherman Act, *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 283 (6th Circ., 1898), modified by limiting the injunction to interstate activities and otherwise affirmed, 175 U. S. 211, 248 (1899), Judge TAFT found it relevant to inquire whether there was in the contract claimed to be illegal

any "main lawful purpose, to subserve which partial restraint is permitted * * *."

It will now be our object to show that the Contract and Rules and the circumstances attending their adoption bring the instant case within the exceptions whose existence is indicated and acknowledged in the foregoing decisions.

2. The impetus toward standardization came from the exhibitors themselves.

No single feature of the case stands out more prominently, as one reads the testimony, than that the initial impetus toward a standard form of contract came from the exhibitors themselves, and that they never relaxed their efforts until their object was attained.

The device of a series of conferences between exhibitors and distributors was adopted as the best means of securing the desired end. These conferences were described by participants, who gave testimony at the trial.

One of the Government witnesses (Mr. Steffes, R., p. 452), himself a motion picture theatre owner and president of the Northwest Theatre Owners Association, and hence qualified to state the exhibitors' point of view, stated that there was "agitation to get a Uniform Contract starting in 1921". He pointed out (and we shall elaborate this extensively at pp. 25-28, *infra*) that exhibitors found difficulties in diversity of contracts. Each contract imposes certain duties upon an exhibitor in connection with forwarding films to the next exhibitor entitled to them, or returning them for that purpose to the Exchange, the times and places of exhibition being arranged in advance according to a necessarily complicated

schedule so drawn up as to ensure the availability of films on dates previously fixed according to contract and advertised to the public, and to minimize the time in which the film is not bringing in revenue to the distributors.* Penalties for delays in forwarding are prescribed, as well as for damage to films by careless handling. The mastery of the way these routine matters are treated in different contracts consumed a large amount of the exhibitor's time, and imposed upon him burdens and worries which could be reduced were all contracts alike in these respects (R., pp. 197, 198, 200, 205, 253). Breaches of contract had become so frequent under the old system (R., pp. 198, 428) that distributors persevered in the practice of calling for advance deposits (R., p. 311). This reflected on the credit of exhibitors as a class and was vexatious to them (R., pp. 206, 299).

Mr. Steffes stated that his association "sent people to New York to confer with some of the sales managers and heads of some of the producing companies, trying to sell them the idea to give us a contract with standard clauses" (R., p. 453). He then testified that strong exhibitor associations from the following states or cities were represented: Michigan, New York, North Carolina, Kansas, Wisconsin, New Jersey, San Francisco, Los Angeles and Niagara Falls (R., p. 454). The original contract committee of the exhibitors was the Board of Directors or Executive Committee of the Motion Picture Theatre Owners of America (R., p. 454). The witness served on a subcommittee (R., p. 454), and produced from his files the original draft of the contract submitted by the exhibitors (Government Exhibit 40, R., p. 1851). A contract was accepted by the Committee in 1923 (R., p. 456).

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*For a further account of distribution methods, see Point II, subpoint 1, *infra*.

The suggestion for arbitration came from the exhibitors as a substitute for the advance deposit system (Hess, R., p. 205).

The contract was put into use gradually in 1923 (Hess, R., p. 207). However, complaints were soon made by the exhibitors that it was not uniform. "Every company was reserving the right to use rubber stamped clauses, extra clauses and additions; the Committee immediately started in negotiating with the Hays organization again for a Uniform Contract" (R., p. 457; and see R., p. 207). A committee was appointed to gather data as to whether "anything in it did not work out equitably and fair" (R., p. 457). Mr. Hays appointed a committee and the witness served on it (R., p. 457).

After some interruptions, negotiations were resumed in 1925, and the "Standard Exhibition Contract" and the "Rules and Regulations Relating to Arbitration" of March 1, 1926, resulted. The witness said (R., p. 458):

> "I signed because I believed that that was the best we could get at that time and thought that we had made a step in the right direction. We at least were assured then that the clauses in the contract would be uniform and all companies would use them."

Early in 1927, the Federal Trade Commission called a Trade Practice Conference of the Motion Picture Industry. The weight this circumstance is entitled to will be discussed *infra*, p. 37.

At the conference * a resolution was passed by an overwhelming majority, with only one vote opposing, expressing the desire of all branches of the industry that

* For an account of what distributors and what exhibitors were present, and what steps were taken to make certain that the delegates would be truly representative, see sub-point 5, *infra*, p. 34.

a uniform exhibition contract be used, declaring the arbitration of disputes arising out of the contract to be a fair trade practice, and directing the designation forthwith of a committee of nine immediately to institute a study of the provisions of the Standard Exhibition Contract and the Rules for Arbitration, provided for therein, and to develop improvement in such Contract and in such Rules for Arbitration, the Contract and Rules to be ready for use for the season of 1928-1929 (Report of Commission [Exhibit "L-1"], R., pp. 537-539 and 574-576).

In accordance with the Resolution, a Contract Committee was constituted (Exhibit 39, pp. 334, 395-397, R., pp. 1837-1840 and 1851). Three members were designated by the delegates sent to the conference by the unaffiliated exhibitors, and three by the producer and distributor delegates. In addition three members without voting power were to be designated by the affiliated exhibitors. Provision was made for the naming of a seventh voting Committeeman, if a dispute necessitated one, by the Chief Justice of the United States (R., p. 1839), but the necessity never arose.

The Committee met in Chicago and their deliberations were described by the witness Hess, who was present (R., p. 240). Their minutes are in evidence as Exhibit "N-1", R., p. 651.

One of the principal problems was how to eliminate the special clauses which, the Exhibitors complained, were added by distributors with such frequency as to destroy all semblance of uniformity in the contracts. The problem was solved by the incorporation in the Standard Exhibition Contract of a warranty of uniformity (more comprehensive than that in the 1926

Contract [R., p. 46]), the full text of which (R., p. 61) will be found in the margin.* The suggestions for each of these clauses of the warranty came initially from the exhibitors (R., pp. 241-242).

3. The situation had become intolerable, and a uniform contract had become a trade necessity.

We have already referred briefly (*supra*, p. 7) to the complaints harbored by the exhibitors which made them take the initiative to obtain a Uniform Contract.

A contract for the lease of a motion picture film must of necessity contain specific provisions on a number of points. *These are all mere matters of mechanical detail, and are not matters with which individuality of taste and judgment has anything to do.* The general scheme of such contracts is outlined in the opinion below, where the Court said (34 F. [2d] 984, 985; R., p. 160):

> "For many years it has been the custom for each distributor of motion picture films in the United States to announce, in the spring of each year, its program of pictures which will be available for exhibition during the year, commencing early in the following fall. Immediately thereafter contracts are solicited from the owners of upwards of 25,000

* "The Distributor warrants that there is contained herein all of the numbered Articles of the 'Standard Exhibition Contract' agreed upon by the Contract Committee appointed at the 1927 Motion Picture Trade Practice Conference (an authenticated copy of which has been filed with the American Arbitration Association). The Distributor also warrants that any clauses in addition thereto appearing upon the Schedule have been approved by such Contract Committee, and that any additional clauses appearing upon a Rider, if any hereto annexed, are not inconsistent with any of such numbered Articles. It is agreed that any clauses contained in such Rider shall be of no effect unless such Rider be signed by the Exhibitor. It is agreed that any agreement contained in the Schedule covering or describing what photoplays are licensed hereunder and in respect of any license fee, exhibition dates and any provision permitted by the provisions of the numbered Articles hereof shall not be deemed an additional clause for the purpose of this Article" (R., p. 61).

> motion picture theatres throughout the United States for the exhibition of these pictures. The business of solicitation is conducted by the branch managers and their salesmen, but the contracts are subject to approval and acceptance at the home office. As a rule the exhibitor contracts with the distributor for a group of pictures, varying in number from 20 to 60, to be made available for exhibition at regular intervals throughout the year. The contract is usually negotiated and concluded before most of the pictures have been produced, and long before they have been made available for distribution, and it is therefore necessary to make provision in the contract for the selection and designation of play dates as the films become available in the exchanges for distribution and exhibition. Since the agreement merely grants a license to exhibit, there are many other details which must be covered by the written agreement."

The "other details" referred to by the Court include the durations of the runs licensed, the license fees, the "protection" to be given to the exhibitor (*i. e.*, the distributor's agreement not to permit the exhibition of the same picture by the exhibitor's competitors for a certain period of time after the exhibition contracted for); the penalty for failure either to forward films promptly to the next exhibitor entitled thereto or to return them for that purpose to the Exchange; the penalty for loss or damage of reels, etc. (Pet., part V, 3; R., p. 18. See also Exhibit "C" annexed to the Petition, pars. second to sixteenth [R., pp. 61-70] for a host of other details).

The consequence of diversity of obligation in matters of petty detail is frequent breaches of contract (R., p. 198).

Litigation proved costly to the distributors and was so rarely effective that breaches were often allowed to pass unnoticed (R., pp. 297-298). The moral tone of the industry declined in consequence, and the record is full of instances of wiliness on the part of exhibitors, who became audacious in their confidence that any breaches of contract they might commit would not result in their being haled into court. Some of these instances occurred after the era of uniformity. As we shall show (pp. 56-59, *infra*) there had by that time occurred an extensive improvement. An argument *a fortiori* may therefore be made from these instances as to conditions in the pre-uniform era.

For example, an exhibitor in Martinsville, Virginia, hearing a competitor was to reopen a theatre previously closed, deliberately contracted to lease more pictures than he could possibly show or had any idea of showing, so as to keep them away from his competitor (R., p. 376). The same unscrupulous conduct on the part of another exhibitor is detailed at R., p. 381.

Another exhibitor who had leased a feature film on the percentage booking system (*i. e.*, rental was to be a percentage of box-office receipts) perpetrated a fraud on the distributor by virtually kidnapping the checker sent to check the sale of tickets and keeping him away from the theatre until the performance was over (R., p. 441).

Finally, the evil of "bicycling" had grown to vast proportions (R., pp. 284-286, 377). "Bicycling" is the practice of leasing a film for one theatre and then showing it at several, the word connoting originally the idea of a messenger speeding on a bicycle from one to the other houses of the same exhibitor. The practice is now

recognized as a violation of the distributor's copyright. The distributors were losing, one witness estimated, as much as $10,000,000 a year by the unauthorized exhibition of their pictures (Hess, R., p. 285). "Bicycling" has, it should be noted, a threefold operation. In the first place, it deprives the distributor of the additional rentals owed for the additional exhibition. In the second place, it may violate the "protection" (defined at p. 26, *supra*) which some other exhibitor has contracted for, thus making an innocent distributor liable for breach of contract. In the third place, it enables exhibitors to injure competitors by what are obviously illegal methods (R., pp. 285-286).

To summarize the foregoing: (1) diversity of contracts increased the frequency of breaches; (2) litigation was costly and ineffective; (3) failure to sue the exhibitors emboldened them to more flagrant disregard of distributors' rights and lowered the moral tone of the industry; (4) the advance deposit system made the honest exhibitors suffer for the faults of the unscrupulous. The elimination of these evils was the "main lawful purpose" (*Addyston Pipe Co. Case, supra*, p. 20) of the Contract and Rules which the appellee has assailed; and there is no doubt that the Standard Exhibition Contract had the further effect of doing away with a number of harsh features characterizing the non-uniform contracts.

4. The history and antecedents of the 1928 Contract and Rules.

We have already (*supra*, pp. 7 and 21) made some reference to the initiation, at the request of certain exhibitors, of the series of conferences in 1922 and 1923

which led up to the first Uniform Exhibition Contract. Mr. Steffes, whose testimony we there cited, gave an account of the conferences from the Exhibitors' standpoint. Three witnesses, Hess, Kent and Kirchwey, gave an account from the Distributors' point of view.

Kirchwey testified (R., p. 320):

> "These negotiations or conferences began, as I recall, in the summer of 1922. I think there was a big luncheon, attended by exhibitors from all over the country and by representatives of the leading distributors, and addressed by General Hays, at which there was discussion of the various matters in the industry which needed ironing out, from the viewpoint of individual exhibitors and distributors, and a Uniform Contract was one of them. That, I think, was the beginning of the negotiations."

And again (R., p. 321):

> "I might say that meeting, of course, had been preceded by numerous sessions at which the contract had been gone over in detail, clause by clause, and item by item, so that really was the consummation of a whole series of conferences. Drafts of the contract were made over this period. I do not recall how many; but I know there were a great many. The contract, as a whole, the individual clauses of the contract, and there was a matter of continual negotiations of give and take."

Hess testified (R., pp. 205-206):

> "These conferences were attended at different times by a great number of exhibitors. * * * The Theatre Owners Chambers of Commerce participated in these conferences and were principally

interested because it was at their instigation that these conferences were arranged.

"Finally, at one of these conferences the exhibitors were asked what they suggested as a substitute for the practice in the past of requiring exhibitors to put up deposits; and in response to that question they suggested an arbitration clause.

• • • • • • • •

"To that suggestion the question was asked 'well, how can the distributors be protected, and how can the awards, if any, that are made by the arbitrators, be enforced?'

"In response to that question the exhibitors offered and suggested that a provision be made in the arbitration clause to the effect that if an exhibitor having been found by a Board of Arbitration to have breached his contract or done anything in violation of his contract, or failed to comply with the direction in the award of the arbitrators that then all distributors with whom he had contracts should be placed in the position of requiring security from him for the performance of his contracts; and they argued that that was simply a substitution for the then existing system of requiring from all distributors [*sic*; should read "exhibitors"] advance deposits, and postponing the time of the requirement of putting up the deposit to the period when it would be determined that the exhibitor had breached the contract.

• • • • • • • •

"And out of those suggestions there was agreed upon the first uniform contract, which contained the arbitration clause, and the rules of arbitration. That Exhibit A of the petition [R., p. 36] is the first uniform contract, Exhibit D [R., p. 80] is the by-laws that were adopted at that time."

Similar in tenor and effect is the testimony of the witness Kent (R., p. 311), and of the Government witness Steffes (R., p. 456).

The Arbitration Clause is Paragraph Nineteenth of the 1923 Contract. The Film Boards of Trade were to be organized and were to include among their functions the participation in the functions of a Board of Arbitration under a set of by-laws drafted subsequently.

After the principles of the Contract had been approved by the delegates to the conference, the distributors gradually began to adopt the contract and use it in their business (R., p. 207). By 1924, continued the witness Hess (*ibid.*),

> "practically all of them had adopted, in principle, the uniform contract, and an arbitration clause, and the Film Boards of Trade had been organized, and the By-laws relating to arbitration had been adopted, but in adopting the uniform form of contract, the distributors continued to add clauses, either in modification of the clauses in the contract or in amplification of them or in addition to them.
>
> "I believe it was in the beginning of 1925, yes some time in 1925, the exhibitors and exhibitors' organizations principally, then began their demands for the reformation of the uniform contract, because of the many changes that had been made by the distributors, and new negotiations were started, new committees were appointed, and the negotiations, which then started, and lasted, I believe, until early in the year 1926."

Hess then proceeded to describe the negotiations leading up to the 1926 Standard Exhibition Contract and Rules and Regulations Relating to Arbitration. He tes-

tified that the 1926 contract was arrived at after numerous conferences in which each paragraph was gone over clause by clause in comparison with the 1923 contract (R., p. 291). He met with committees of different organizations, and there were committees of individual organizations. He went to Detroit to confer with Mr. Ritchie, manager of the Michigan Exhibitors' Association. He was at all the conferences with all the exhibitor representatives, as well as with all of the distributor representatives. That lasted about ten months (R., p. 291).

Referring to the 1926 contract finally approved at a meeting at the Union League Club on February 6, 1926 (for a list of persons signing it and their capacities see R., p. 208), Mr. Hess testified "I think there were 25 different galley proofs made of this 1926 contract before it was finally agreed upon" (R., p. 309). The distributors were over at the Association offices and the exhibitors were at the Union League Club, and each clause was taken up one after the other and changes that were made were then telephoned over to the distributors at the Association office (R., p. 309). This was the final conference. It had been preceded by continuous meetings and conferences extending through the preceding ten months (R., p. 291), during all of which time no complaint was voiced against the Arbitration feature, though it had been in use ever since 1923.

As to the signing by the exhibitors of the statement approving the 1926 Contract, Mr. Hess testified (R., p. 208):

"It was signed by Mr. Jules Michael, who was president of the Motion Picture Theatre Owners of the State of New York, Buffalo Zone; Mr. H. M. Ritchie, who was the general business manager of the Motion Picture Theatre Owners of the State of Michigan; Mr. Frank J. Rembush, who was president of the Motion Picture Theatre Owners of the State of Indiana. Mr. H. A. Cole, who was president of the Theatre Owners of the State of Texas. Mr. Julian Brylawski, who was president of the Motion Picture Theatre Owners of the District of Columbia and Maryland. Mr. J. M. Seider, who was president of the Motion Picture Theatre Owners of New Jersey; Mr. R. R. Beachley, who was president of the Motion Picture Theatre Owners of Kansas and Missouri; Mr. Charles O'Reilly, who was president of the Theatre Owners Chamber of Commerce of New York City and W. A. Steffes, who was president of the Motion Picture Theatre Owners of the Northwest,—and I believe that is the corporate title, I am not certain of it, which comprised the States of Minnesota and North and South Dakota; Mr. R. F. Woodhull, who was president of the Motion Picture Theatre Owners of America, the national organization of exhibitors. There was at that time only one national organization of exhibitors. The other organizations mentioned were the largest and most representative organizations of exhibitors in the country.

"These men had been appointed by these organizations to act on this committee, and I believe they represented other exhibitor organizations at this conference."

To the same effect see Steffes, R., pp. 462-464.

5. Every effort was made to secure adequate representation of the exhibitors.

We have already referred (*supra*, p. 22) to the personnel of the earlier delegations who attended the conferences of 1922-23 and 1925-26. The conference of 1927-28 was a trade practice conference called by the Federal Trade Commission. The agent assigned to prepare plans for the conference, Mr. Flannery (R., p. 236), asked Mr. Hess for suggestions as to how to convey the proposal to the exhibitors. Hess put him in touch with the Film Boards of Trade and they in turn assisted Flannery by directing envelopes to all known theatre owners, using their latest records. The envelopes were handed over to the Federal Trade Commission and mailed with the requisite notices enclosed (R., p. 237).

The plan of representation which the Commission had decided to employ was (R., p. 237) that there should be two delegates from the unaffiliated exhibitors in each of the thirty-two Film Boards of Trade centers, one representing the ownership of theatres less than five; and one representing ownership of five theatres or more; so that they took in all classes of unaffiliated exhibitors.

Unaffiliated exhibitors were represented by 66 delegates, two each from the 32 zones, and two in addition from New Jersey, whose exhibitors felt that they were denied representation and applied to the Commission for permission to send delegates, which request was granted by the Commission and the appointments were confirmed by the delegates from the 32 zones (Flannery Report, Ex. "L-1" p. 24, R., p. 559). The affiliated exhibitors were represented by 59 delegates. The producers were represented by 43 delegates in person and all other independent or distributor members of the 32

Film Boards of Trade were represented by proxy and power of attorney by C. C. Pettijohn (*ibid.*). A list of the producers, distributors, exhibitors and representatives of the public group affiliations represented at the conference is set forth in the pamphlet, pages 26-30 (R., pp. 560-568).

These delegates were elected or selected in all localities by the local exhibitors' organizations; each selected two delegates. In some places where there were no regularly organized exhibitors, the exhibitors' representatives on the Arbitration Boards, in conference with exhibitors in the territory which had not been organized, selected the delegates of the classes suggested by the Commission. Mr. Myers, the Commissioner who presided at the conference, being called as a witness by the Government, testified that he, as well as the Commission, had approved the plan of representation and that he thought it was a fair plan (R., p. 450).

The Commission in its subsequently published pamphlet (Defts.' Exhibit "L-1", R., p. 536) describing the work of the Conference states (R., p. 537):

> "The industry, consisting of producers, distributors and exhibitors was represented in practically its entirety."

In the same pamphlet it is later stated (R., p. 558):

> "Practically 100 per cent of those engaged in the production, distribution and exhibition of motion pictures were represented at this conference."

At the conclusion of its deliberations, the Contract Committee on October 5, 1928, caused to be drawn up and signed by all its members a memorandum of agreement (Defendants' Exhibit "E-1", R., p. 615; and see Hess,

R., p. 290) which recites that the "Contract Committee having again met * * * and considered many plans and suggestions to finance the operations of the Boards of Arbitration and the national and all local exhibitor organizations," the Committee has reached the "conclusion that the financing of the Boards of Arbitration should not be linked with the financing of national and local exhibitor organizations," and that the Committee had agreed upon another plan to finance the operations of the Boards of Arbitration, and therefore the members of the Contract Committee "agree that *the Contract as agreed upon at Chicago on February 21, 1928 be and the same hereby is finally agreed upon as the Standard Exhibition Contract of the motion picture industry, without reservations or exceptions of any kind or character,* the Contract Committee, however, continuing to act in relation thereto under and in accordance with the Resolution of the Trade Practice Conference which appointed the Committee" (R., pp. 615-616; italics ours).

More significant, however, than any of the actual devices to secure representation of the exhibitors before the event, is the circumstance that after the 1928 Contract was adopted, and the business of the motion picture industry had been carried on conformably to it over a period of about a year, not a single complaint was testified to at the trial. Cooperation is the strongest kind of endorsement. Whatever defect may be thought to have existed in the original representative character of the delegates—if indeed there was any defect at all—may be said to have been fully cured by this general approval and endorsement.

Evidences of unqualified endorsement appear frequently throughout the Record. See, *e. g.*, R., pp. 411, 424, 425, 429, 434, 437, 438. We shall dwell on this cooperation in our discussion of Arbitration, *infra*, p. 77.

a. *Legal significance of a trade practice conference.*

We do not claim that the part played in 1927-28 by the Federal Trade Commission and its trade practice conference gave to the 1928 Contract and Rules anything like an indelible sanctity. The legal effect of a trade practice conference is naturally nebulous because the conference has no express justification in the Federal Trade Commission Act (38 Stat. 717; U. S. C. Tit. 15, Secs. 41-51).

A recent writer, C. W. Dunn, *The Federal Anti-Trust Law* (1930), has said (p. 16):

> "It [the trade practice conference] is designed to effect the self-elimination of unfair trade practices by trade agreement."

Speaking of the lack of statutory authorization, Mr. Dunn says (p. 42):

> "While section 5 contains no reference to the conference procedure the commission's authority to devise and use it to prevent illegal methods may be reasonably implied. This because the section broadly directs and empowers the commission to prevent the use of all unfair methods of competition in interstate and foreign commerce; because section 6 empowers the commission to make rules and regulations to carry out the provisions of the act. The opposing argument is that section 5 expressly defines but one procedure to administer it,

the formal proceeding, and thus by implication excludes any other. This construction is rejected because it limits the broad powers which the act confers upon the commission; because the section should be liberally construed to accomplish its great purpose. The act is not penal and its strict construction is not required."

In conclusion he says (pp. 42-43):

"The trade practice conference is the most constructive and potentially the most effective procedure used by the commission. It is the most constructive procedure because it substitutes cooperation with business for what is in effect the prosecution of it; because it encourages and promotes self-regulation by business. By self-regulation alone can the purpose of the act be most effectively realized. It is potentially the most effective procedure because it is directed to secure a general, as distinguished from an individual, discontinuance of unfair methods; because it is used to promote the discontinuance of all uneconomic and unethical methods, whether illegal or not. In short, the trade practice conference procedure presents a practical and safe plan of self-regulation and a preventive of commission proceeding and government regulation otherwise required. If and to the extent it fails, the fault is not in the procedure or in the commission. It is in business itself. The commission can do no more than to offer business the opportunity and means of self-regulation. And it should do no less."*

This Court, we feel confident, will at least be indisposed to take such a view of a trade practice conference

*And see G. C. Henderson, *The Federal Trade Commission* (1924), pp. 243-244, where the author commends the trade practice conference as having a "judicial * * * tone" and "scientific spirit," so that "the educational influence of a single trade practice submittal is as valuable as the coercion of a host of formal complaints and orders."

as will convert it into a trap to lure men into violations of the Sherman Act. We believe, on the contrary, that the circumstance that the 1928 Contract and Rules resulted from such a conference is evidence of their reasonableness. It is a circumstance which "may help the court to interpret facts and to predict consequences" (*Chicago Board of Trade* v. *United States, supra,* p. 19); it shows, without doubt, that the action taken had for its object "the intelligent conduct of business operations" (*Maple Flooring Assoc.* v. *United States, supra,* p. 20).

6. The Exhibitors were largely responsible for the terms of the present contract.

The witness Hess, general counsel for the Appellant Motion Picture Producers and Distributors of America, Inc., had years of familiarity with the business and legal problems of the motion picture industry, and was an experienced draughtsman of motion picture contracts (R., p. 199). He was "the one person who was present at all meetings either of exhibitors or distributors" (R., p. 309), and his testimony on direct examination covers 111 pages of the Record. He testified with great detail as to (1) features of the different distributors' contracts of the pre-uniform period which the exhibitors objected to; and (2) features of the earlier uniform contracts which the exhibitors wished to have altered, and did have altered, in the later uniform contracts.

The suggestions emanating from the exhibitors were adopted in the main (R., p. 297);* they touched no less than twenty-nine separate and distinct terms of the contract.

These may be seen more easily in the subjoined tabular view.

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* Some suggestions were not pressed. See *infra,* p. 44.

Nature of Exhibitors' Suggestion	Record Page of Hess' Testimony	Where provision suggested was finally embodied in 1928 Contract or Rules	Record Page
1. the standing order clause should be amended so as to prevent automatic renewals upon inaction	211, 230, 231	(standing order clause abolished entirely)	
2. disputes must be submitted to arbitration within nine months of date of origin	283	Rule II, 8	107
3. Boards of Arbitration should have power to enjoin a threatened breach of contract	211	Rule III, 4	109
4. the contract should contain a warranty of uniformity	241, 242	Contr., Par. first	61
5. certain types of additional clauses should be printed on the schedule	215, 216	Contr., Par. first	61
6. the "road show" clause (defined at R., p. 223) should be standardized and added to the contract	228	Contr., added clause 3	76-78
7. the Boards of Arbitration should be required to hold special meetings to consider anticipatory breaches	228, 229	Rule III, 4	109
8. additional clauses requiring exhibitors to pay more than 3 days before delivery of films should be forbidden	229	*Cf.* contr., Par. fourth	62

Nature of Exhibitors' Suggestion	Record Page of Hess' Testimony	Where provision suggested was finally embodied in 1928 Contract or Rules	Record Page
9. when applications by exhibitors for different classes of films are made, the applications for each class should be accepted or rejected as a unit	243	Contr., Par. twenty-second	75
10. the inspector of books in percentage booking cases should not be resident of, or a person employed in, exhibitor's place of business unless exhibitor consents	245	Contr., added clause 4	78-79
11. period of protection should run from last day of exhibition of picture instead of first	247	Contr., Par. sixth	63
12. protection shall be against after-opened as well as against existing theatres	248	Contr., Par. sixth	63
13. prints shall be "suitable for exhibition"	249	Contr., Par. seventh	63
14. prints shall be delivered at least an hour before usual time of opening theatre	251	Contr., Par. seventh	64
15. in case of non-delivery, exhibitors may sue distributors and recover from them, and Board of Arbitration may bring in another exhibitor if he is the actually responsible party	251, 284	Rule IV, 4	111

Nature of Exhibitors' Suggestion	Record Page of Hess' Testimony	Where provision suggested was finally embodied in 1928 Contract or Rules	Record Page
16. notices of availability shall not be sent out by distributor until prints are on hand in the Exchange from which the Exhibitor is being served	253	Contr., Par. eighth (1)	65
17. penalty for loss of prints shall be limited to replacement costs	255	Contr., Par. ninth	66
18. if film paid for as lost is recovered, exhibitor shall have option to take cash or credit	255, 256	Contr., Par. ninth	66
19. exhibitors shall not be liable for damage to films while in transit	255	Contr., Par. ninth	67
20. if defects exist in prints, exhibitors need not notify distributor on day of receipt but may do so any time before second public exhibition	258, 294	Contr., Par. ninth	67
21. the distributor after contract is made calling for particular star, director or story shall not have the right to substitute other pictures with a different star, director or story	259, 260	Contr., Par. tenth	67
22. Pictures should not include advertising matter which distributors have been paid to insert	261, 262	Contr., Par. thirteenth	68

Nature of Exhibitors' Suggestion	Record Page of Hess' Testimony	Where provision suggested was finally embodied in 1928 Contract or Rules	Record Page
23. Percentage booking contracts shall contain a liquidated damage clause	276	Contr., added clause 5	79
24. when distributors initiate arbitration proceedings against an exhibitor, the secretary of the Board of Arbitration shall notify not only the exhibitor but the local Exhibitors' Association as well	283	Rule III, 2	108
25. in proper cases hearings may be had on 24 hours notice	283	Rule III, 4	109
26. the prohibition of bicycling shall be expressly set forth in contract	285, 286	Contr., Par. third	62
27. theatres contracting for subsequent runs shall not begin displaying advertisements until end of first run	295	Contr., Par. twelfth	68
28. blank space for payment by exhibitor on execution of contract shall be eliminated	296	Contr., Par. fifth (contrast 1923 contract, Par. seventeenth)	63 42
29. the provision that the contract is complete and that no promises by either party to the other have been made except as set forth in contract, shall be set out in a separate paragraph	296	Contr., Par. nineteenth (contrast 1923 contract, Par. eighteenth)	73 43

On the other hand, it proved impossible to accede to every suggestion that came from the exhibitors. In many cases, the suggestion was withdrawn when the reasons why it was impractical or unfair were explained (R., pp. 211, 216, 244, 245, 260, 267). The testimony, taken as a whole, shows that the exhibitors were allowed to air their views with the utmost freedom, and that all their suggestions were fully discussed, a very large percentage of them being embodied in the Contract and Rules in their final form. This negatives the Government's contention that the Standard Exhibition Contracts were forced on the industry by the Distributors.

7. The terms of the Standard Exhibition Contract aim to combat specific evils and are reasonably commensurate with the necessities of the case.

The very fact of diversity was, as we have already shown (*supra,* pp. 21, 22) the most important single evil sought to be combatted by the adoption of a uniform or standard exhibition contract. The advance deposit system (also previously referred to, *supra,* p. 22) was the second evil. The witnesses repeatedly bracketed these two evils together as the controlling factors behind the whole movement for a uniform contract. See, *e. g.,* R., pp. 200, 205, 311.

The scheme of fixing play dates is the most important feature of any given motion picture leasing contract (R., p. 311). Yet the distributors cannot fix them arbitrarily because if they did, it would, as the witness Kent put it (R., p. 311) "be almost impossible for him [the exhibitor] to handle his show so as to get the most out of his picture". As was set forth in the answer (R., p. 124) and admitted by the Government (R., p. 197),

> "The contract is negotiated and concluded prior to the production of most of the pictures and before their release date, except in case of spot bookings of single pictures. Therefore it is necessary to provide in the contract for the selection or designation of playdates as the pictures become available for exhibition. This arrangement requires a clearly drawn provision and cannot be trusted to verbal agreement."

Paragraph eighth of the 1928 Contract (R., p. 64) provides the machinery for fixing play dates if the exhibition dates selected by the exhibitor are not available. The exhibitor is allowed one alternative selection. If such selection is not made or does not end the conflict, the Distributor does the selecting but must adhere to the Exhibitor's selection to the extent of not selecting dates more than two weeks earlier nor six weeks later than the dates first selected by the Exhibitor. When for any reason the foregoing plan cannot be followed out, an alternate plan is given [see sub-par. "(B)", R., p. 65]. The general scheme is not different in substance from the scheme embodied in paragraph ninth of the 1926 Contract (R., p. 48) to which, according to Hess's testimony (R., p. 253), neither distributors nor exhibitors had objected. The changes made were the result of an attempt at clarification (R., p. 253). Hess also said (*ibid.*):

> "Before the Uniform Contract of 1923, this machinery for designation of play dates was totally different between the different exhibitors, and it made much confusion in the assignment of play dates."

The indifference to contractual obligations to which we have already referred (*supra*, pp. 22, 26, 27), and

which had become general in the days before uniformity (R., p. 311), took the form *inter alia* of a lack of attention on the exhibitors' part to the care of prints, so that in many cases damages occurred (R., p. 311). It became necessary, therefore, to fix by contract a rate of compensation for damage to prints. Several companies had charged 8 cents a foot (R., pp. 489, 491, 493). Some charged 15 cents (R., pp. 203, 500, 505), which gave a penal aspect to the damages allowed. The likelihood of improvement on the adoption of the Uniform Contract was seemingly responsible for a reduction of the damage rate to the actual cost of replacement. See paragraph ninth of the 1928 Contract (R., p. 66).

The enforcement of stale claims had become an evil (R., pp. 211, 221, 283). As a result, and at the suggestion of the exhibitors, the 1928 Rules of Arbitration (Rule II, 8, R., p. 107) laid down the requirement that claims be presented within nine months of their origin.

"Bicycling" was a flagrant evil and had caused losses to the distributors estimated at $10,000,000 a year (R., p. 285). It injured at the same time the honest exhibitors. (See *supra*, p. 28). This explains paragraph third of the 1928 Contract.

Other evils characterizing the pre-uniform era were responsible for remedial provisions which appear in the Arbitration Clause (paragraph eighteenth) and in the Rules of Arbitration. We shall deal with these in Point II, *infra*.

A pervading characteristic of the Standard Exhibition Contract of 1928 is a reduction in harshness when compared with the corresponding terms either of the earlier standard contracts or with the non-uniform contracts in use before 1923.

Thus the distributors were formerly accustomed to reserve the right to demand security for faithful performance from an exhibitor *at any time* and without assigning any reason for doing so. Contracts could be cancelled if security was not forthcoming. See the illustrative clauses from the non-uniform contracts at R., pp. 203-204; and see R., pp. 311 and 424. See also Exhibits "A" to "Q" (R., pp. 484-523). The right or option to demand security does not arise now until a definite justification for the demand exists, *i. e.*, the occurrence of a breach on the exhibitor's part of the agreement to arbitrate, or a refusal to comply with an award entered against him (R., p. 72). This has reduced the number of instances in which a deposit of security is required to a comparatively insignificant figure.

Under the old regime, contracts were not assignable upon a sale of a theatre without the written consent of the distributor. (See the clauses dealing with assignments in the specimen non-uniform contracts, Exhibits "A" to "Q", especially R., pp. 487, 490, 494, 500, 504, 511 and 522). But under each of these uniform or standard contracts annexed to the petition, contracts are upon a sale assignable without the written consent of the distributor (1923, R., p. 41; 1926, R., p. 52; 1928, R., p. 67).

It is submitted that, when due allowance is made for the irresponsibility of some exhibitors (R., pp. 299, 300, 317, 318, 343, 419) and for the tendency toward chicanery which had become endemic in 1922 (*supra*, p. 27), the Standard Exhibition Contract of 1928 is neither abnormal nor unreasonable; and that its adoption is quite within the category of "normal and usual contracts to further trade * * *." *United States* v. *American Tobacco Co., supra*, p. 20.

8. The procedure adopted and the standardization resulting are in line with a current industrial trend.

The United States Department of Commerce published, in 1927 (Mr. Hoover being Secretary of Commerce), a volume entitled *Trade Association Activities*. It was therein declared (pp. 3-4):

> "Chapter X, which treats of trade relations and arbitration, covers a field in which the trade association has been of great value to its members and to the public by doing away with trade abuses and unethical practices. The value of these services is difficult to estimate in money, but it is clear that the evils which they combat lay an enormous burden on legitimate business. Commercial arbitration has substantially aided in reducing unethical practices and trade abuses".

It was further stated (pp. 108-109):

> "The liberal attitude of Government toward industry has encouraged business men throughout the country to attack collectively the subject of trade relations and self-regulation".
>
> "Many trade associations have built up methods adopted by their membership for the elimination of abuses within their trades. These methods vary with the nature of the abuse, the strength of the association's hold on its membership, and the degree of cordiality existing between the members of the association and their customers. Such attempts to correct bad practices within a trade usually result in the adoption by the association of uniform sales contracts, codes of ethics, and standards of practice, and in the promotion of arbitration for the settlement of disputes".

The Department goes on to describe the efforts made in this direction by the National Trade Relations Com-

mittee of the Chamber of Commerce of the United States, as follows (pp. 114-115):

"In general, the function of the National Trade Relations Committee is to urge upon and aid trade associations in the setting up of joint trade relations committees within their own membership for dealing with complaints and misunderstandings which arise between buyers and sellers. Specifically, the purposes of this committee may be summarized as follows:

1. To gather together the experience and best practice of all existing trade relations groups; to disseminate these facts in order that all such groups shall be acquainted with the best practices; and by these means eventually to simplify the future dealings between members of one group and another.

2. To inspire and to advise in the formation of a joint trade relations committee within each appropriate trade division, whose purpose shall be the ultimate establishment of a clearing house to investigate complaints of actions by producers or distributors which are not in accord with reputable trade practice.

3. To develop between manufacturers, wholesalers, and retailers joint agreements on standards of reputable trade practice, which shall serve as guides for the dealings between members of one group and another.

4. To bring about the adoption of arbitration in the settlement of commercial disputes.

"The committee is composed of representatives of different merchandise groups—manufacturers, wholesalers, retailers, and the consuming public.

"Trade associations usually consist of only manufacturers, or only wholesalers, or only retailers, while the violations of commercial ethics in the vast major-

ity of instances take place in the dealings between manufacturers and wholesalers or between wholesalers and retailers. For this reason joint trade relations committees are necessary in order that the disputes and unethical practices which occur between different branches of the same trade may be studied collectively and methods may be devised for their elimination".

In the same volume, under the title "Standard Documentation", the Department, speaking of the standard contract adopted by the American Institute of Architects, uses the following pertinent language (p. 163):

"The advantages of the standard contract form arise partly from its inherent fairness both to the owner and to the contractor and from the workability of its provisions, which reduce disputes and delays to a minimum, and to the fact that it is well known to architects, builders, and the public. Neither party has to employ a lawyer to find out whether a 'joker' is hidden somewhere in fine print. The essentials of each contract can be filled in with a minimum effort. Its use in building contracts represents a development in many ways comparable with that of the one-price system in retail stores or the adoption of a uniform negotiable instruments act by a majority of the States.

"A clause providing for arbitration of all disputes between the owner and contractor is considered one of the most notable features of the standard-contract agreement. The details involved in the construction of a building as to quality of materials and workmanship and the different minor items, such as finish and trim, are too numerous to be specified completely in an ordinary business transaction. For this and other reasons there are endless possibilities for controversy between the owner and the contractor, which furnish the grounds for ill feeling and litigation. Provisions

that questions shall be arbitrated under circumstances that permit rapid decision by a fair and impartial arbitrator do much to assure a reasonable attitude on the part of the owner, the architect who represents him and the contractor".

Standardization and arbitration are linked together in *Trade Associations—Their Economic Significance and Legal Status* (1925; one of the publications of the National Industrial Conference Board) as the best remedies for the recent excessive growth of commercial litigation.

The evil is thus described (p. 275):

> "The growth of litigation during the past half century and the general predominance of civil suits involving business relationships provide concrete evidence of the frequency of commercial disputes. The sources of friction are numerous and varied. The unstandardized character of commercial products, and of the nomenclature descriptive of them or of their essential characteristics, may prevent a real meeting of minds in the negotiation of contracts. The uncertainty and fluidity of trade customs and usages may lead to a like situation."

And the remedy (p. 276):

> "The remedy appears to lie in two directions: the occasions for commercial disputes may be minimized, and the differences which they reflect may be composed more effectively."

Concerning standardization as one branch of the remedy, it is said (p. 276):

> "Standardization of products and of trade names, *the adoption of uniform contract forms*, and the development, through codes of ethics and standard practice arrangements, of norms of business conduct, all tend to render commercial deal-

> ings more certain and more dependable and hence to reduce the frequency of commercial disputes" * (Italics ours.)

And concerning arbitration as the other (pp. 277-278):

> "* * * there has been a persistent movement in recent years to develop informal, extra-legal agencies for expediting and improving the determination of commercial disputes. The method thus developed of minimizing friction and dislocation within the economic process in the settlement of business differences is generally referred to as commercial arbitration. * * * it tends to establish a body of technical precedents distinctively applicable to the particular trade or industry, and thus remove in a measure occasions for future misunderstanding; and in so far as provision for arbitration is incorporated into commercial contracts it serves to enhance the confidence of the participants in the integrity and fair dealing of their business connections."

POINT II.

Arbitration is well adapted to the needs of the Motion Picture Industry.

1. The necessity for the speedy termination of disputes results from the concatenation of interests in a particular film.

The outstanding features of the business of leasing motion picture films have been described *supra*, in Point I, sub-points 2 and 7. It is averred in the Answer (R.,

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* See also Kirsh, *Trade Associations—The Legal Aspects* (1928), where it is said (p. 208): "One of the outstanding features of American industry is the program of standardization. It ranks with industrial and commercial research and statistical measurement of business activities as cardinal points in the development of present-day business."

pp. 123-124) and admitted as true by the Government (R., p. 197) that:

> "In respect to each picture, the exhibitor (the owner or operator of a theatre), acquires a license under copyright to exhibit the picture at a specified theatre for a limited number of days stated in the contract [Pet., R., p. 59]. He acquires nothing more than the right to use for a limited time the property of the distributor which must be returned promptly to the owner at the conclusion of its use for a like use by other exhibitors who have acquired a similar right in the same picture. The motion picture print moves either on a circuit from place to place, being exhibited at each place, or back and forth between distributor and exhibitors."

It is also alleged in the Answer (R., p. 132) that in the motion picture industry it is essential that controversies be determined quickly, that is to say, within a short time after the controversy arises. Promptness of decision is almost as important as fairness of decision. This fact is recognized throughout the industry. The reason is found in the nature of a motion picture. The rental value of a motion picture is greatest when it is new, that is immediately after its release date or availability for exhibition; as the release date is departed from the rental and exhibition value of the picture rapidly diminish. Approximately fifty per cent of the total receipts of a distributor are obtained from the first 1,200 out of a probable 10,000 showings (R., p. 132). Therefore, if the exhibition is prevented by long continued litigation both the exhibition and the rental value of the picture will disappear long before the litigation is terminated. These allegations were proved by the testimony (R., pp. 312,

313). Further proof, offered at R., p. 317, was cut off by the Court as unnecessary.

The findings of the Court were in accord with the Appellants' contentions, for Judge THACHER said in the opinion in No. 95 (*United States* v. *First National Pictures, Inc.*, 34 F. [2d] 815, 816), an opinion which he virtually incorporated by reference (R., p. 159) into his opinion in the instant case:

> "Nor could the films thus thrown back upon the exchanges be readily placed in other theaters, because their programs had been arranged long in advance, and even when this could be done the films had generally become stale, and commanded very much lower rentals than when originally licensed."

See also Record in No. 95, pp. 108-109.

The speedy determination of disputes, therefore, is a necessity for two reasons:

1. The rapidity with which the rental value of a film declines after its first run (R., p. 312; and see p. 6, *supra*).

2. The fact that the detention of a film by the exhibitor having, for example, the second run will work an injury to the exhibitors having the right to all of the subsequent runs (R., pp. 313 and 319-320).

And the Rules of Arbitration are a necessity for the reason that arbitration is ineffective unless there exist means of compelling recourse to it in practice after it has been adopted in principle.

2. Costliness of other modes of settlement.

It was proved by undisputed testimony (R., pp. 297-298) that litigation was futile because it was both slow and costly. Congestion of court calendars in our large cities is an evil so notorious as to be within the judicial notice of this Court. On the other hand, the Boards of Arbitration were always abreast of their calendars (R., p. 414).

Not only is the carrying on of litigation a costly process, involving as it inevitably must the retention by the distributors of local counsel in scores of different towns where a dispute with an exhibitor might arise, but it is costly by reason of its slowness. For during the pendency of a suit over a film, the distributor can do nothing to mitigate his damages, and by the end of the litigation the film may have a greatly reduced rental value or none at all. Similarly, an exhibitor at the end of a litigation may find himself forced to exhibit a picture so ancient that its exhibition would injuriously affect his good will (Answer, Par. xii, R., p. 133; Kent, R., pp. 312, 314).

3. Arbitration has an ethical aspect; it has stabilized the industry, improved its moral tone and eliminated causes of friction.

Recourse to litigation to settle disputes between exhibitors and distributors was attended, as we have seen (*supra,* p. 27), by so many disadvantages that the general tendency of the distributors was, after trying litigation, "to revert to the old policy of having the contracts take care of themselves" (R., p. 298). Forty per cent of the contracts taken by the exhibitors were never complied with (R., p. 297). Contracts "were taken presumably to be broken by either party" (R., p. 424).

"Prior to the Uniform Contract, contracts were flagrantly disregarded and not considered more than a scrap of paper" (R., p. 428).

If recourse to the ordinary means of enforcing respect for contractual obligations is impossible and if, either *post hoc* or *propter hoc,* the normal presumption that business men intend to keep their contracts ceases to be justified in fact, then the only course of action for the party likely to be injured by breaches of contract is to require from the other side an advance deposit of security for faithful performance. That was the plan followed in the motion picture industry; and protests followed of course. See *supra,* p. 22. *Arbitration was the answer from the exhibitors themselves when they were asked to suggest a substitute for the advance deposit system* (R., p. 205).

That arbitration at once stabilized the entire industry* was the tenor of the uncontradicted testimony of several witnesses (R., pp. 299, 352, 427, 428, 466; see also Exhibit "N-1", p. 63, R., p. 693). It improved the "ethics of the business" and lifted the industry "up to a plane that I had never thought possible" (Feist, R., p. 317). This was the result hoped for, since, as Mr. Hoover when Secretary of Commerce said in the 1927 *Year Book of the American Arbitration Association* (Foreword, p. viii):

> "Obviously arbitration performs an ethical function hardly second in importance to its economic object."

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* It is a fair, indeed a very direct, inference from the decision of this Court in *Maple Flooring Assoc.* v. *United States, supra,* that to effect stabilization in a trade is not to effect an unlawful restraint of trade but, on the contrary, is a laudable step toward the "intelligent conduct of business operations". See 268 U. S., at pp. 582-583.

Arbitration, in eliminating causes of dissatisfaction such as advance deposits, and in raising the ethics of the industry, has "built up a lot of good will in addition" (Kent, R., p. 312). The same witness continued (R., p. 314):

> "The purpose of my company in joining in on this arbitration plan was because we believed it was good for the industry; we believed it was economically sound, reducing losses on both sides; we believed it cured a great deal of the bad blood that existed prior to that time between exhibitors on the one hand and distributors on the other. I think that it has had that effect. I think the conditions are a hundred times better, at least a hundred times better than before we put it into effect with the general run of exhibitors, and certainly with the distributors."

Mr. Kent, it should be observed, was general manager of Paramount Famous Lasky Corporation, a distributor which served between 9,000 and 10,000 exhibitors in the United States. His company has 45 branches in the United States and Canada, and 117 abroad (R., p. 310).

Mr. Feist, general manager for another distributor, Metro-Goldwyn-Mayer, who served on the Contract Committee appointed at the Trade Practice Conference (R., p. 316), graphically described the contrast between conditions before and after the adoption of the Uniform Contract, saying (R., pp. 316-317):

> "I will briefly state it from my own point of view, what the conditions were in the industry in 1922, leading up to the Uniform Contract. I should say that out of probably 6,000 contracts at that time, that the large national distributors had, that there were not more than 20 per cent that the distributor

himself considered valid. For the most part, the condition that existed was such that we sometimes doubted when we shipped a film or print, I refer to, whether we would get it back or not. In fact, in my own experience, in certain territories of the United States of America, we had great difficulty in getting our prints back; the exhibitor, as a whole, in those days was not a trustworthy individual. I remember the cry that was brought out by the legitimate exhibitors of the United States of America, at least those with whom I came in contact, that they were being penalized in getting credit because of the great rank and file of the unscrupulous ones."

He was out of the business of distribution for a few years and the difference was remarkable when he went back to his old work. He continued (R., p. 317):

"It is my opinion that the Uniform Contract and the Arbitration Board did for the unscrupulous man more than it did for anyone else in the motion picture industry. Instead of the minority being respected with the advent of the Uniform Contract and the arbitration, the great majority were respected.

"* * * when I came back to active distribution, and got back on the firing line, and found this condition, it was heaven. By that I mean the exhibitors in the United States of America, by this thing had been lifted up to a plane that I had never thought possible. The ethics of the business had been improved to such an extent."

Miss Schofield, Secretary of the St. Louis Film Board of Trade, testified that when the Arbitration System took effect "a complete revolution resulted. * * * It seemed like the industry settled and became stabilized, and since then there has been steady improvement" (R., p. 424).

Mr. Hess also testified (R., pp. 299-300):

> "I think that * * * the establishment of the Film Boards of Trade [part of the arbitration machinery] has done much to educate the exhibitors and distributors, and has brought about a more cordial relationship between them. * * * since the establishment of the Film Boards and Associations, [there has been] a marked improvement * * *."

Mr. Nizer, Secretary of the New York Film Board of Trade, testified (R., p. 418):

> "But the effect of arbitration now is to afford the exhibitor and distributor an immediate opportunity to adjust their differences without expense, without undue expense; and without any filing fees or attorneys' fees usually. *The very existence of the system prevents the wrongs which formerly may have existed*" (Italics ours).

The quotation last made is in singularly close accord with the remarks of Mr. Hoover in the 1927 *Yearbook of the American Arbitration Association,* where after commenting on the low ratio of the number of arbitrations in proportion to the facilities provided, he said (Foreword, p. vii):

> "A single organization reports the yearly sale to its members of half a million standard contract forms containing an arbitration clause. And yet the machinery appears not to be idle, for it seems that the mere existence of the facilities has made their use unnecessary through the development within the trade itself of a better spirit, a higher standard of ethical practices, and a desire for good-will which have actually reduced the number and acute nature of the disputes."

See to the same effect Sturges, *Commercial Arbitrations and Awards* (1930), p. iii.

4. Current public policy, as manifested in recent statutes, favors arbitration.

If the activities of the defendants are such as to justify the assertion that they are engaged in interstate commerce, as the Court held (34 F. [2d], at p. 988; R., p. 168), it must be equally clear that the activities are also brought within the field covered by the United States Arbitration Act (43 Stat. 883; U. S. C. Tit. 9). The statute was pleaded in the Answer (R., p. 152).

We refer to the Arbitration Act not to invoke and have applied its specific provisions, but because the incorporation of such an Act in the general body of federal law is a strong and persuasive declaration by Congress of a public policy in favor of commercial arbitration.

In the Department of Commerce publication entitled *Trade Association Activities* to which we have already referred, it is said (p. 112):

> "A number of trade associations provide standard contracts containing arbitration clauses. These clauses may be enforced under trade rules. In the States of New York, New Jersey, Massachusetts, Oregon, and recently California and Pennsylvania, the clauses are enforceable by law*. This is also the case under the Federal arbitration act [43 Stat. 883] in admiralty transactions and in interstate commerce disputes involving over $3,000."

And Mr. Hoover in the 1927 *Yearbook of the American Arbitration Association*, said (Foreword, p. vii):

> "I have been for many years of the conviction that the arbitration of commercial disputes in

* See p. 62, *infra*, for a more complete list of such States.

place of avoidable litigation is an agency of the first rank in the promotion of business efficiency. Information collected by the Department of Commerce over the past several years has clearly showed that the substantial element of the American business public is overwhelmingly in favor of arbitration in the settlement of commercial disputes.

"The reason for the rapid rise of the commercial arbitration movement from a dream and a theory to a reality and practical adoption lies in the adaptability of arbitration to the multiple problems that arise in dealings between units of organized business. Within a chamber of commerce or a trade association it is possible to standardize many of the differences and conflicts which arise in the performance of everyday contracts. Such inevitable conflicts are often amenable to prompt settlement by those who know the particular trade and enjoy the confidence of the parties in dispute.

"* * * Not only does this trade machinery relieve the congestion in the courts, but it relieves the taxpayer from assessment for additional facilities. In other words, business taxes itself to pay the cost of keeping commercial peace."

In *Suggestions for the Practice of Commercial Arbitration,* prepared by the American Arbitration Association in 1928, the following pertinent observations occur in the opening chapter (pp. 4-5):

"Modern business transactions and conditions necessitate the expert and speedy determination of disputes by methods which will preserve goodwill and friendly relations and which will maintain the

value of the commodity over which the dispute has arisen.

* * * * * * *

"Many claims are small and frequently do not warrant a lawsuit and a compromise of the claim leaves a rankling feeling of injustice with both parties but arbitration is applicable to the smallest claim and restores goodwill.

"Time is valuable to business men and a proceeding which adapts itself to their convenience as to office hours, place of hearings and prior engagements is far more advantageous for commerce than a court which summons a party without respect to existing business obligations."

Such has been the progress of the law in the last few years that the total number of States having Arbitration Acts, *i. e.*, acts declaring agreements to arbitrate to be valid and enforcible, has risen to fifteen. A list is subjoined.

	State	*Year*	*Chapter*
1	New York	1920	275
2	New Jersey	1923	134
3	Massachusetts	1925	294
4	Nevada	1925	7
5	Oregon	1925	186
6	California	1927	225
7	North Carolina	1927	94
8	Pennsylvania	1927	248
9	Utah	1927	62
10	Wyoming	1927	96
11	Louisiana	1928	262
12	Arizona	1929	72
13	Connecticut	1929	65
14	New Hampshire	1929	147
15	Rhode Island	1929	1408

The state of affairs produced by statute in the foregoing list of states was effected by judicial decision without the aid of a statute in two states, to-wit, Colorado and Washington. See *Ezell* v. *Rocky Mountain Company,* 76 Colo. 409, 232 Pac. 680 (1925); *Herring-Hall-Marvin Safe Co.* v. *Purcell Safe Company,* 81 Wash. 592, 142 Pac. 1153 (1914). Furthermore, contracts to arbitrate are valid and enforcible under the law of England. See 52 & 53 Vict., c. 49 (1889); 10 & 11 Geo. V, c. 81 (1920).

The above list owes its rapid growth to the fact that both the American Arbitration Association and the National Commissioners on Uniform State Laws have interested themselves in the preparation and passage of uniform statutes declaring agreements to arbitrate valid and enforcible, as well as to the demands of modern business for speedy settlement of commercial disputes. The draft of statute prepared by the American Arbitration Association covers agreements to arbitrate both existing and future disputes, and has been adopted, with minor variations not affecting substance, in Arizona, California, Connecticut, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania and Rhode Island. The draft of statute prepared by the National Commissioners on Uniform State Laws has been adopted, with like qualifications, in Nevada, North Carolina, Utah and Wyoming. This statute, however, does not go beyond providing for the enforcement of agreements to submit present and existing disputes to arbitration. For the text of the two drafts, see Sturges, *Commercial Arbitrations and Awards* (1930), pp. 977 and 983, respectively.

The benefits reasonably expected to flow from the adoption of the Uniform Arbitration Law prepared by the National Commissioners were thus described in the

Report of the Committee on Commerce, Trade and Commercial Law of the American Bar Association, which approved the draft of the Commissioners (47 Am. Bar Assoc. Rep. 295 [1922]):

> "In the opinion of your committee, the adoption of the * * * uniform state statute will put the United States in the forefront in this procedural reform. It will raise the standards of commercial ethics. It will reduce litigation. It will enable business men to settle their disputes expeditiously and economically, and will reduce the congestion in the federal and state courts. In pressing forward this improvement in the law, the Association will align itself with the best economic and commercial thought of the country and will do much to overcome the criticism of the 'law's delays'."

POINT III.

The manner in which the contract and rules have worked out in practice, and the significant absence of complaints, reflect their reasonable character.

1. There has been no reduction of competition.

The Court below found in our favor on this issue. See discussion in Point IV, *infra*. Hence a brief reference to the testimony will suffice here.

At the time of the trial, which began on March 14, 1929 (R., p. 183), six years had elapsed since the adoption of the original Uniform Contract of 1923. Yet during those six years, the number of theatres has increased from 15,000 to between 20,000 and 25,000 (R., p. 298). Mr. Kent testified that the industry "has never been anything else but highly competitive since I have been connected with it" (R., p. 318). He added that as far as he knew it continued to be highly competitive through

the period when the Uniform Contract was in force (*ibid.*). Miss Schofield said (R., p. 424): "Competition is very active between the distributors in my territory". Mr. Phillips, asked whether the arbitration plan had diminished competition, said (R., p. 428): "Competition is as keen today as it ever was". And see R., p. 387.

Of particular weight, however, is the fact that the Government, conceding the truth of certain allegations in the Answer (R., p. 120), stipulated to the following effect (R., p. 193):

> "At all the times mentioned in the Petition there has been, and there is today, competition throughout the United States in the distribution of motion picture films by the defendant distributors and by other distributors engaged in the motion picture business. At all such times the defendant distributors have been, and they are today, competing with each other, and with all other distributors in the distribution of their pictures throughout the United States."

The Government also admitted (R., p. 198) the truth of the following portion of the Answer (R., p. 125):

> "* * * the average exhibitor contracts in the course of a year with from 5 to 15 distributors who actively compete for the business * * *."

2. The enforcement methods are reasonable and have been applied fairly by the Film Boards of Trade.

The testimony contains a large number of brief descriptions of the facts and decisions in arbitrated cases. And Exhibit 38 (R., p. 1579) is a complete file of cases arbitrated before the Philadelphia Film Board of Trade

in the year 1928*. It is a fair generalization from these that the awards were never unduly harsh, that they inclined decidedly towards leniency in the exhibitors' favor, and that compliance was generally prompt and ungrudging. When complaints were filed against distributors, their duties were judged by the same standards as were applied to exhibitors.

a. *Organization and Procedure.*

The organization of the different boards varies as to matters of detail, but the general plan is to have three arbitrators appointed by the distributors and three by the exhibitors who must, of course, be unaffiliated exhibitors† (R., pp. 402, 432; and see the 1928 Rules of Arbitration, Rule I, 1, R., p. 104). In case of a tie, these six may appoint a seventh arbitrator, or may have the seventh arbitrator designated by the President of the local chamber of commerce, or by the Mayor or chief executive of the city. The seventh arbitrator must not be interested in the motion picture business (Rule I, 7, R., p. 106). Distinguished persons have served in this capacity (R., pp. 350, 388, 412). Challenges are liberally allowed (R., p. 412).

If the exhibitor does not appear, the distributor must prove that notice of hearing was received (R., p. 336). The Secretary of the local Exhibitors Association usually represents the exhibitor (R., p. 337), even if the exhibitor has defaulted and made no request for representation (R., p. 346). In some regions, the President of the Ex-

* This file is stipulated to be typical of the *modus operandi* of Film Boards generally (R., p. 366).

† An unaffiliated exhibitor is one whose theatre is not owned or controlled by producers or distributors. R., p. 104.

hibitors Association appears for the exhibitor even though the exhibitor is not a member of the Association (R., pp. 353, 427; and see R., p. 436).

The procedure is simplified. Mr. Nizer, Secretary of the New York Film Board of Trade, testified (R., p. 413):

> "The claim is filed in a very simple manner. It has been so simplified that any exhibitor even if he was illiterate could file a claim. All he has to do is write a letter stating in ordinary language the nature of his complaint, sometimes only ten lines. He sends that letter to our office, and we make a copy of it, and forward it to the distributor. Notice is sent to him, and eventually the claim appears upon the calendar, after it has been given due notice."

As to the evidence which is received, he said (R., p. 414):

> "There is no technical procedure in the receipt of evidence. Almost anything is received, and the arbitrators consider it later as to the validity and the weight it should have. If the exhibitor wishes to sum up he is given that opportunity to, and so is the distributor. The proceeding is informal and is conducted along business lines. The main object being to get at all the facts as quickly as possible, although there are sessions that take as long as five or six hours, no matter how small the amount may be, because the arbitrators are anxious to hear all the facts in the dispute."

Neither side may offer parol evidence to vary the terms of the contract (Hess., R., p. 296), though it is sometimes received in "bicycling" cases, *i. e.*, an exhibitor may show an oral permit to make the exhibition complained of (R., p. 442).

b. *Nature of cases handled by the Boards and of relief awarded.*

The types of claims which distributors may file against exhibitors are listed at R., p. 370, and the converse types (exhibitors against distributors) at R., p. 372.

In one Film Board of Trade, 1042 claims were handled involving a total of only $120,000 or an average of $115 (R., p. 335). Obviously if these could only have been brought in courts of law, a large number would never have been prosecuted at all, with the result that losses would be suffered on the one hand, and on the other a feeling would have been generated that contractual obligations could be broken with impunity.

The awards are frequently less severe on the exhibitors than would have been the judgments entered in a court of law. Thus in one case 37 claims for "bicycling" were filed against an exhibitor. Under the copyright law the distributor was entitled to $250 for each offense or a total of $9250. The Board of Arbitration awarded him $1900 (R., p. 443).

A court of law has not the facility for allowing a judgment to be paid in instalments. Yet the record shows two instances where the Board of Arbitration ordered an exhibitor who was unable to pay all the award at once to make partial payments weekly (Lynch, R., p. 346; McCullough, R., p. 436).

The element of speed in the relief awarded is, of course, the most important contribution of the Arbitration plan to the improvement of the industry. A Board of Arbitration may under the Rules (Rule III, 4, R., p. 109) be convened on 24-hours' notice, an illustrative case being described at R., p. 427. Decisions are generally handed down without delay at the close of a case (R., p. 414).

c. *The enforcement methods are neither harsh nor unjust.*

There is evidence, in addition to that which we have just cited, as to the leniency with which the Rules were applied, it being the effort of the Boards to avoid the forfeiture and cancellation of contracts except in extreme cases. Mr. Nizer, Secretary of the New York Film Board of Trade, testified (R., p. 415):

> "The policy of our office is to make easier the relationship between the exhibitors and the distributors; and not merely to represent the distributors. The exhibitors evidence their satisfaction with that system by coming in great numbers to our office where they receive relief; * * *."

In line with this policy, defaults are entered with reluctance and the exhibitor may get as many as three or four extensions of the time for compliance with an award (R., p. 416). Defaults are generally opened without question (R., p. 422). Dates at which distributors had the right to suspend contracts were frequently extended by the Board (R., p. 423).

The fairness of the whole system is shown by the fact that only two instances of suits to modify awards were brought out by the testimony, one in New York which ended in a dismissal (R., p. 426), and one in Texas (R., p. 361) the outcome of which is not given. Seven Secretaries testified that there had been in their territories no suits whatsoever to modify or vacate awards (R., pp. 343, 347, 397, 419, 425, 432, 437).

The large percentage of cases in which the Boards reached their decisions unanimously was testified to by four witnesses (R., pp. 332, 348, 397, 412).

The amount of security which may be demanded of an exhibitor who has not complied with an award is limited

by Par. eighteenth of the Standard Exhibition Contract of 1928 to $500 for each existing contract (R., p. 72). This sum is not, in fact, excessive, especially as the 1928 Rules of Arbitration (Rule IV, 3, R., p. 110) provide that the deposit "shall not exceed the actual value of any print thereafter to be delivered under each such contract plus the rental contracted to be paid therefor, * * *." The basis of the right to any security lies in the fact that to surrender possession of a film to an exhibitor is to extend credit to him. He may lose or damage the print, he may make an unauthorized use of it, as by "bicycling" it; he may fail to return or pass it on promptly, thus rendering the distributor liable to the next exhibitor, who is injured by the delay. In Exhibit "J-1" (R., p. 646) we show the classes of claims filed against exhibitors. The following is an outline of the exhibit:

	Number	
	1927	1928
For breach of contract in not exhibiting pictures	11,721	18,684
For giving bad check	431	692
For pictures unpaid for delivered on open account	1,518	1,654
Late return of print	141	139
Damaged print	264	386
Lost print	54	96
Violation of copyright law:		
1. Switching	36	14
2. Bicycling	121	175
Declaratory award (validity of contract)	121	154
Declaratory award (interpretation of contract)	15	19
Miscellaneous	240	865*

*671 of these 865 cases were claims to obtain percentage or box office statements.

In fixing the amount of security which must be deposited, the Board of Arbitration takes into consideration the income earned by the theatre concerned, its seating capacity and business conditions (R., p. 344). An analysis of Exhibit 38 (R., p. 1579), which is a complete record of arbitration cases heard by the Philadelphia Film Board of Trade in the year 1928 *, shows that deposits were provided for in the event of non-compliance in 216 cases and that the average amount of the deposit so provided for was $203.47. The sum of $500, which is the maximum demandable per contract under Par. eighteenth of the Standard Contract (R., p. 72), is sometimes actually less than the *rentals* an exhibitor has contracted to pay per week (R., pp. 365, 374), so that the security is far below the value of the property it protects. Under the old regime, advance deposits might have been as high as 25% of the gross sum due on the entire contract (R., p. 311). The difficulties of salvaging a contract or of placing a film again after one exhibitor has broken his contract to take it, are patent (R., p. 314). Mr. Feist testified that in his opinion, "we are altogether too lenient with the physical property we entrust these men with" (R., p. 318). And in this connection it is important to bear in mind the testimony of Mr. Hess (already referred to, *supra*, p. 27) as to the futility of litigation. He said (R., p. 298):

> "A very small percentage of the amount sued for was collected under those hundreds of law suits, and a very small percentage of the amount that was recovered by the way of judgments."

Even when a distributor sues upon an award and gets a judgment, he often fails to collect anything on it (R., p. 419).

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* See first footnote on page 66, *supra*.

One of the items which seems to have influenced the trial court against the whole plan of arbitration was the fact that the right to demand security for performance of *existing* contracts is given to *each* distributor whenever the exhibitor has refused to arbitrate with any one of them. After summarizing the provisions of Paragraph eighteenth of the Standard Contract (R., p. 71), the trial judge stated (R., p. 165):

> "It will be noted that the effect of these provisions is that, if an exhibitor fails or refuses to submit to arbitration any claim or controversy arising under any contract with any distributor, then the right of every distributor to demand security upon every contract immediately arises, and, if the demand is not complied with within 7 days, all pending contracts with every distributor may be canceled."

The provision thus criticized, we submit, was in essence closely analogous to the ordinary practice of many credit associations, and was perfectly fair and reasonable.

It is not at all uncommon, in the case of a credit bureau or association, for all the members of the association, either by agreement or following their individual business judgment, to refuse to deal with a customer listed as delinquent. This practice has over and over again been sanctioned by the courts and is regarded as perfectly proper.

United States v. *Fur Dressers & Fur Dyers Ass'n., Inc.* 5 F. (2d) 869 (S. D. N. Y., 1925);

Putnal v. *Inman,* 76 Fla. 553, 556, 80 So. 316 (1918);

Brewster v. *Miller's Sons Co.*, 101 Ky. 368, 381, 41 S. W. 301 (1897);

Reynolds v. *Plumbers' Protective Assoc.*, 30 Misc. (N. Y.) 709, 712, 63 N. Y. Supp. 303 (1900);

Delz v. *Winfree*, 6 Tex. Civ. App. 11, 25 S. W. 50 (1894);

Woodhouse v. *Powles*, 43 Wash. 617, 621, 86 Pac. 1063. (1906).

It is likewise significant that in *Cement Manufacturers Association* v. *United States*, 268 U. S. 588, 604 (1925), this Court said:

> "In *Swift & Co.* v. *United States*, 196 U. S. 375, 395 [1905], this Court approved a decree which provided that defendants should not be restrained from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers. Distribution of information as to credit and responsibility of buyers undoubtedly prevents fraud and cuts down to some degree commercial transactions which would otherwise be induced by fraud."

In *United States* v. *King*, 229 Fed. 275 (D. Mass., 1915), the Court said (p. 278):

> "Persons have a right to associate for the purpose of advancing their own interests by discriminating against other persons, if such discrimination is based upon proper and legal grounds, e. g., failure to pay bills due to members of the association (Brewster v. Miller, 101 Ky. 368, 41 S. W. 301), and is not merely coercive and arbitrary, as in Martell v. White, 185 Mass. 255, 69 N. E. 1085;

nor for the purpose of restraining interstate trade, as in Eastern States Lumber Association v. U. S., 234 U. S. 600."

These and other similar cases clearly lay down the rule that it is in no way unlawful for business men, banded together for their mutual interests, to discriminate against, or even to refuse altogether to deal with, persons who are delinquent in meeting their bills. In the present case, the situation is by no means so extreme. Here, upon the refusal of an exhibitor to proceed to arbitration, or upon his failure to comply with an arbitral award, he is not cut off from obtaining supplies; nor are the distributors authorized or required by the terms of the contract to refuse to make new contracts with him. All that the exhibitor's refusal entails is a liability to each distributor to put up security for the performance of existing contracts, and the suspension, or possible loss of service on those contracts as to which he fails to do so. We submit that there is nothing unreasonable in this. If an exhibitor deliberately refuses to carry out the valid and reasonable provisions of a contract requiring him to arbitrate disputes before an unprejudiced tribunal, it is only reasonable that the distributors with whom he has dealings should require security from him. This is in no way equivalent to the imposition of an arbitrary penalty. Refusal to arbitrate or refusal to comply with an arbitral award would seem no different in principle from refusal to pay one's bills or to meet one's other lawful contractual obligations and such refusal may properly be followed by collective action designed to uphold and enforce the arbitral agreement. In fact, we do not see why there cannot be applied to

this situation the language which Judge THACHER used in the companion case (*United States* v. *First National Pictures, Inc.*, 34 F. [2d] 815) when he said (p. 819):

> "The defendants' agreement to demand security was fully justified by their common interest in preserving the integrity of contractual obligations owing to them by others. Such restraints as may have resulted from what was done were incidental to this legitimate purpose, and therefore not unreasonable or unlawful."

Moreover it must be noted that the provision for collective action to enforce arbitration was suggested by the exhibitors themselves. Mr. Hess testified without contradiction (R., pp. 205-206):

> "Finally, at one of these conferences the exhibitors were asked what they suggested as a substitute for the practice in the past of requiring exhibitors to put up deposits; and in response to that question they suggested an arbitration clause.
> * * *
> "To that suggestion the question was asked, 'well, how can the distributors be protected, and how can the awards, if any, that are made by the arbitrators, be enforced?'
> "In response to that question the *exhibitors offered and suggested* that provision be made in the arbitration clause to the effect that if an exhibitor having been found by a Board of Arbitration to have breached his contract or done anything in violation of his contract, or failed to comply with the direction in the award of the arbitrators *that then all distributors with whom he had contracts should be placed in the position of requiring security from him for the perform-*

> *ance of his contracts;* and they argued that that was simply a substitution for the then existing system of requiring from all exhibitors advance deposits, and postponing the time of the requirement of putting up the deposit to the period when it would be determined that the exhibitor had breached the contract" (Italics ours).

Under these circumstances we submit that the "collective sanction" (if it can be called such) was a perfectly fair and proper method to adopt in the enforcement of the arbitration clause; and its adoption cannot be considered an unlawful or unreasonable restraint of trade.

It should be observed at this point that an exhibitor who has refused to arbitrate or refused to comply with an award is not prevented from getting pictures. If he does not wish to deposit security, he may do one of three things: (1) he may "spot-book" pictures; or (2) he may get them from distributors who are not members of the Film Board of Trade; or (3) he may make *new* contracts with member distributors (for security may be required from such an exhibitor for the performance of *existing* contracts only).

To sum up the foregoing: (1) the right to demand security was, in the pre-uniform days, a universal right and was resorted to regardless of whether the exhibitor was in default or not; (2) for this situation the exhibitors themselves suggested arbitration as a remedy, and the requirement of security from defaulters as a means of enforcing awards; (3) yet, disregarding the reduction in hardships effected by the Arbitration Plan, the Government contends that Arbitration is unfair to the Exhibitors.

The Plan must be judged by its results; and so judged its fairness is not only undisputed but indisputable.

3. The Exhibitors have given unequivocal evidence of their endorsement of the Contract and Rules.

Would the exhibitor organizations be cooperating throughout the country in appointing exhibitor representatives to the Boards of Arbitration and would such representatives be deciding thousands of cases annually in accordance with the Rules if the exhibitors as a class did not believe that the set-up of the Arbitration Plan is fair, and that substantial justice is promptly attained in proceedings before the Boards?

The support and cooperation offered by the exhibitors was the subject of direct testimony on the part of several Secretaries of the Film Boards of Trade (New York, R., p. 411; Chicago, R., p. 425; St. Louis, R., p. 424; Cleveland, R., p. 435; Salt Lake City, R., p. 429; Kansas City, R., p. 434; Butte, R., p. 437; Memphis-Little Rock, R., p. 438).

There is a singular lack of objection by exhibitors to the Arbitration Plan at the present time. Whatever initial hostility may have existed in earlier years there was little apparent at the time of the trial. There was no testimony that any theatres had been forced to close on account of the plan.* Even the Government witness who testified that his organization had not voted a formal approval of the Plan, testified that they were nevertheless operating under it (Steffes, R., pp. 460, 461).

In this connection we invite the Court's attention to Government Exhibit 42 (R., p. 1861), a letter written on October 18, 1926 to the president of the appellant Asso-

*As to the effect of the absence of such testimony, see *United States v. United States Steel Corp.*, p. 8, *supra*.

ciation (Motion Picture Producers and Distributors of America, Inc.) by a committee of exhibitors headed by Mr. Steffes himself. In this letter occurs the following statement (R., p. 1862):

> "We all believe that the principle of arbitration is too big and has accomplished too much for this industry to permit such practices* to nullify the good work already accomplished and the future benefits to be derived."

And at the Chicago meetings of the Contract Committee appointed at the Trade Practice Conference, the Exhibitor delegates took the following stand (Exhibit "N-1", p. 40, R., p. 677):

> "It is the unanimous decision of the Exhibitor group that they heartily endorse the principle of arbitration and its use in the industry, but feel that any attempt to right [*sic*] rules for arbitration until the contract and its provisions are agreed upon would be a useless waste of valuable time because of the certainty that, with contemplated changes in the contract, would of necessity come changes in said rules."

All four of the Government witnesses signed one or the other of the uniform contracts when the forms were agreed upon in committee. Thus Steffes signed the 1926 Contract as a member of the Advisory Committee (R., p. 462). Cole signed the 1926 Contract at the meeting at the Union League Club (R., p. 467). So did Seider (R., p. 474). Yamins approved the 1928 Contract in his

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* The practices complained of were criticisms by high officers in distributor organizations of the distributor members of Boards of Arbitration on account of their decisions. The addressee of the letter took immediate steps to stop the practice and to make it clear that members of the Board of Arbitration should be left free to give proper judgments in all cases without fear of criticism. See Government Exhibit 43, R., page 1863.

capacity as a member of the Contract Committee, appointed at the Trade Practice Conference (R., pp. 478-479).

Mr. Steffes described a standard form of contract used by an exhibitors' exchange organized in Minnesota called "Motion Picture Theatre Owners of the Northwest". He said (R., pp. 462-463):

> "This form is identical with the Standard Contract adopted in 1926, and we have used it three or four years. I do not know if we are now using the 1928 form of contract."

POINT IV.

The decree is inconsistent with the facts stipulated of record as well as with the Court's findings of fact.

The Court in its opinion declared (34 F. [2d] at pp. 988-989; R., p. 168):

> "That competition between the distributors has been promoted by the adoption of the standard exhibition contract, and that in many ways general trade conditions have been vastly improved, I have no doubt, and so find."

The Government, admitting the truth of certain allegations in the Answer (R., p. 120), stipulated to the following effect (R., p. 193):

> "At all the times mentioned in the Petition there has been, and there is today, competition throughout the United States in the distribution of motion picture films by the defendant distributors and by other distributors engaged in the mo-

> tion picture business. At all such times the defendant distributors have been, and they are today, competing with each other, and with all other distributors in the distribution of their pictures throughout the United States."

The Appellants submit (see par. 24 of the Assignment of Errors [R., p. 182]) that an agreement or combination which in its effect, so far from lessening competition, actually increases competition and vastly improves trade conditions, does not amount to a violation of the Sherman Act. For if a restraint is attended by such consequences, it should follow as a conclusion of law that its dimensions are reasonable. *Chicago Board of Trade* v. *United States, supra,* p. 19. To give to what is palpably a dissentient minority* of exhibitors, whom the Government was apparently unable to locate, and for whom the Government was unable to secure a spokesman and to put him on the witness stand, the power of undoing all that had been accomplished toward the improvement of the industry with the consent of the majority and with its cooperation—in fact, upon the initiative and insistence of that majority—is to strike at the foundations of the rule of reason, and to ignore the repeated decisions of this Court.

In another respect the District Judge showed a disregard of the *Chicago Board of Trade Case.* He said (R., p. 170):

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*It will be recalled that the Federal Trade Commission, in describing the trade practice conference of the motion picture industry, said: "Practically 100 per cent. of those engaged in the production, distribution and exhibition of motion pictures were represented at this conference" (R., p. 558).

> "the restraint if not shown to have been voluntary on both sides is oppressive, and therefore undue and unreasonable."

But in the *Chicago Board of Trade Case*, the restraint (which this Court refused to condemn) was felt by a large class of persons, to-wit, the consumers of grain, who were wholly unrepresented when the Call Rule was framed, and as to whom the restraint was certainly not voluntary. In the light of that decision, the District Judge's conclusive presumption that the restraint because not "voluntary on both sides" was necessarily unlawful, was erroneous.

POINT V.

The injunction should be directed solely against the so-called "supplemental agreements".

The Petition (part IX, 6, R., p. 33) charges that certain Exchange Managers, who were members of the Film Boards of Trade, on their own responsibility have supplemented and exceeded the Uniform and Standard Exhibition Contracts and the rules relating to arbitration. The Government produced some evidence of two types of such alleged "Supplemental Agreements". These types are (1) an agreement to refuse to enter into *new* contracts for the future exhibition of motion picture films with any exhibitor who has failed to comply with an award of any Board of Arbitration, except on the condition precedent that the exhibitor so failing to comply with an award deposits security with each distributor with

whom he desires to enter into such new contracts; (2) an agreement to refuse to enter into new contracts to furnish films for the future exhibition of pictures with any exhibitor who has failed to comply with an award, regardless of whether such exhibitor is willing to place a deposit as security for the performance of such new contracts with the distributor with whom he desires to enter into such contracts.

The Petition, it is to be noted, also alleges (R., p. 33) that the members of the Film Boards of Trade who have made these supplemental agreements have done so "without the knowledge and against the general instructions of the defendant distributors and of the defendant Association".

For the purposes of this appeal, the Appellants instead of justifying the making of the so-called supplemental agreements, prefer to take the position that the question of their legality is moot, the Appellants having shown at the trial not only that the members of the Film Boards of Trade had been instructed in 1926 by the Association to cease entering into supplemental agreements (R., pp. 364-365, 407, 429), but also that the practice of entering into them had been abandoned (R., pp. 359, 360, 362, 364, 365, 376, 391, 398, 406, 407, 424, 433, 434, 436, 438). Whether the Court in making the Decree appealed from considered it necessary to enjoin such supplemental agreements is not clear, but Par. II, 6 of the Decree (R., p. 172) would seem to include them within its injunctive provisions. Such inclusion was not assigned as error for the reason that the Decree was to that extent deemed unobjectionable.

Summary.

The Arbitration Plan as established by the 1928 Contract and Rules is the culmination of six years of cooperative effort on the part of distributors and exhibitors to remedy a number of unfortunate trade tendencies which were a serious grievance to the exhibitors and against which they had begun to voice a complaint in 1921. The Plan was preceded by a genuine attempt to secure the most universal possible representation of exhibitors, and was approved by the Federal Trade Commission. As the Plan has remedied those evils one by one, given stability to the industry and promoted good will between distributors and exhibitors, so its abolition by judicial decree must inevitably produce a retrogression to the chaotic conditions that prevailed before—contracts varying from one another in minutiae, frequent though unintentional breaches, forfeitures, interruptions of service, futile litigation, callousness toward commercial obligations, mutual distrust. As was said in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 47 (1918): "* * * the idea is repellent that so complete an instrumentality should be dismantled and its concentration and efficiency lost."

CONCLUSION.

The decree appealed from should be reversed and a decree entered with its injunctive provisions limited as described in Point V, *supra*.

Dated, New York, N. Y., October 3, 1930.

Respectfully submitted,

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APPENDIX

SHERMAN ANTI-TRUST ACT

Sections 1-4

Act of July 2, 1890

(26 Stat., 209, U. S. C. Title 15, Secs. 1-4)

AN ACT To protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

* * * * * * * *